SUPREME COURT OF WISCONSIN

HERITAGE MUTUAL INSURANCE COMPANY and
LARSEN LABORATORIES, INC.,

Plaintiffs-Appellants-Petitioners,

v.

Court of Appeals
Case No. 98-3577

WILLIAM E. LARSEN and
LABOR AND INDUSTRY REVIEW COMMISSION

Trial Court
Case No. 98-CV-003116

Defendants-Respondents.

BRIEF OF PLAINTIFFS-APPELLANTS-PETITIONERS, HERITAGE MUTUAL INSURANCE COMPANY AND LARSEN LABORATORIES, INC.

Milwaukee County
Judge Michael G. Malmstadt

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STATEMENT REGARDING ORAL ARGUMENT AND PUBLICATION OF OPINION

It is respectfully suggested that this case be submitted with oral argument. The petitioners are of the position that oral argument will lend itself to a better understanding and clarification of the issues presented pursuant to Section 809.22(2)(b), Stats.

Petitioners also request that this decision be published pursuant to Section 809.23(1)(a), Stats., in that the Court's opinion will apply a rule of law to a factual situation significantly different from that in published opinions and that the Court's decision in this case is one of substantial and continuing public interest.

STATEMENT OF THE CASE AND RELEVANT FACTS

I Procedural Status of Case

William Larsen filed an application for hearing with the Worker's Compensation Division seeking various indemnity benefits and medical expenses. A hearing was held before an administration law judge on May 21, 1997, subsequent to which the judge issued a decision on August 18, 1997, finding that Mr. Larsen was engaged in a business trip at the time of his injuries but further finding that Mr. Larsen had entered a zone of danger not created by the condition of employment and, impliedly, found that his entrance into that "zone of danger" was a personal deviation which did not entitle him to benefits. The administrative law judge found that Larsen had passed out "secondary to ethanol abuse" but did not address the issue of decreased compensation, pursuant to §102.58. Stats., since the judge found that Larsen was not entitled to compensation.

Larsen took an appeal to LIRC. On March 31, 1998, LIRC issued its opinion and order overruling the administrative law judge's decision and LIRC found that the evidence led to an inference that Larsen's purpose in going to Tigerton on the date of the accident was business related. Further, LIRC, using the positional risk analysis, determined that the zone of special danger, exposure to cold weather, was occasioned by reason of an employment activity. Finally, LIRC found, based on the testimony, that Larsen was intoxicated and that his intoxication was a substantial factor in causing his injuries. Accordingly, LIRC reduced Larsen's entitlement to indemnity benefits by fifteen percent (15%), pursuant to §102.58, Stats.

Heritage filed a timely petition for review of LIRC's decision in the Milwaukee County Circuit Court. On November 16, 1998, Honorable Michael Malmstadt issued a memorandum decision affirming LIRC's decision awarding Larsen worker's compensation benefits but overruling LIRC's decision reducing those benefits pursuant to §102.58, Stats.

Heritage appealed the decision of the trial court. On appeal, although LIRC defended the trial court's affirmance of its decision as to compensability, it "acquiesced" in the trial court's reversal of its decision as to a reduction in benefits due to intoxication. On March 14, 2000, the Court of Appeals issued a per curium decision affirming the decision of the trial court.

The Petition for Review followed. On September 12, 2000, this Court granted the Petition.

II Statement of Facts

William Larsen, at the time of his injury, was employed at Larsen Laboratories which is jointly owned by him and his wife. Larsen Labs is engaged in metal testing for other companies, mainly foundries, and acts as an independent contractor in the metal analysis business. (R.6, Transcript 14; App. 114)

Applicant's job duties at Larsen Labs included maintenance of equipment, programming of equipment, testing of metals and also sales relating to the services provided by Larsen Labs. (R.6, Transcript 14; App. 114) Larsen contends that his injury occurred while he was making a sales call. In describing his sales duties at Larsen Labs, Larsen indicated that routinely he would solicit new customers on the telephone and occasionally follow up in person in order to close the sale. (R.6, Transcript 16; App. 116)

Larsen testified at the hearing that 99% of the time he would personally visit potential customers only after trying to obtain their business by telephone. (Id. 22)

On the day before the date of injury, Larsen alleges that he was intending to travel to Tigerton, Wisconsin, in order to visit a previous customer, Aarow Electric Casting ("Aarow Electric") from ten years earlier. (R.6, Transcript 23; App. 123) Aarow Electric was a prior customer that Larsen Laboratories had done limited business with between October, 1987 and August, 1988. Arrow Electric is located in Shawano, Wisconsin. This Court can take judicial notice that Shawano, Wisconsin, is less than 150 miles from Milwaukee.

Larsen testified that he contacted Aarow Electric approximately one year prior to the date of his injury in an effort to re-secure its business. (R.6, Transcript 43-44; App. 143-144) However, that 1995 sales call was unsuccessful. One employee at Aarow Electric, Rex Harrison, indicated that Larsen Labs would be unable to do business with Aarow Electric unless Larsen Labs gained its Caterpillar certification. (R.6, Transcript 59; App. 159) Upon information and belief, as of today's date, Larsen Labs is still not Caterpillar certified.

It is important to note that before making this trip on January 31, 1996, Larsen did not arrange a sales appointment with any individual working at Aarow Electric for either February 1 or February 2, 1996. (R.6, Transcript 23, 70; App. 123, 170) Larsen claims that he informed his wife before he made this trip that he was intending on calling on Aarow Electric. (R.6, Transcript 23; App. 123)

Larsen owns a parcel of property in close proximity to Tigerton, Wisconsin, on which he placed a mobile home. (R.6, Transcript 24; App. 124) The mobile home has been situated on the property since approximately 1991. Larsen testified that he initially used the

mobile home for purely recreational activities, such as hunting. (R.6, Transcript 24; App. 124) Since 1993, Larsen has allegedly also used the mobile home for business purposes, notably as a sales office. (R. 6, Transcript 25; App. 125) The address of the mobile home does not appear on the defendant's business card as a place of business. (R.6, Transcript 53; App. 153) Larsen Labs did not insure the mobile home as a business property on its business insurance. Furthermore, Larsen Labs never had business insurance coverage on the mobile home from its inception as an alleged office. (R.6, Transcript 62, 63; App. 162, 163) Also, the mobile home was never listed as an extra office on the Larsen Labs worker's compensation policy.

At the hearing, Larsen testified that he frequently visited the mobile home, due to marital problems. (R.6, Transcript 89; App. 189) Larsen testified that he stayed at the mobile home a number of times between 1993 and 1995 because of disagreements with his wife. (R.6, Transcript 89; App. 189) He would either stay at the mobile home or a motel when his marital problem became severe and his wife instructed him to leave their home in Cudahy, Wisconsin. (R.6, Transcript 86-88; App. 186-188) From September 10, 1995, to October 18, 1995, he was living at the mobile home but could not provide a reason why he stayed there. (R.6, Transcript 90; App. 190) Larsen further testified that he did not use the mobile home for business purposes in either December of 1995 or January of 1996, the two preceding months prior to his alleged sales call on Aarow Electric. (R.6, Transcript 29; App. 129)

On January 31, 1996, Larsen left his Milwaukee work place at 12:30 p.m. (R.6, Transcript 29; App. 129). Upon arriving at Tigerton, which is five miles from the mobile

home, Larsen stopped at a grocery store and purchased groceries. At the grocery store, Larsen bought, among other things, a bottle of Kessler Whiskey. (R.6, Transcript 29; App. 129) He then proceeded to a feed mill to pick up shelled corn for feeding deer. (R.6, Transcript 29; App. 129)

After leaving the feed mill, Larsen proceeded to a tavern called the Split Rock Inn, which is located between Tigerton and his mobile home. (R.6, Transcript 30; App. 130) While at the Split Rock Inn, he consumed at least 4-5 mixed drinks of Kessler Whiskey and diet coke in approximately 1 hour and 45 minutes. (R.6, Transcript 96; App. 196) After leaving the Split Rock Inn at approximately 6:00 p.m., he drove to the mobile home where he intended on having more drinks. (R.6, Transcript 35, 94 and 100; App. 135, 194 and 200)

Upon arriving at his mobile home, Larsen attempted to open the front door but had difficulty using the key in the door lock. (R.6, Transcript 36-37; App. 136-137) While attempting to open the front door, Larsen experienced dizziness and lightheadedness. (R.6, Transcript 37, 38; App. 137, 138) He then attempted to open the door forcibly with a snow shovel but was unsuccessful. (R.6, Transcript 38; App. 138) Finally, Larsen broke the plastic window on the door and reached in and opened the door from the inside. (R.6, Transcript 38; App. 138) Upon entering the mobile home, Larsen passed out onto the floor leaving the door partially open until waking up at 8:00 a.m. the next morning on February 1, 1996. (R.6, Transcript 39; App. 139) He does not know why he lost consciousness while entering his mobile home on the evening of January 31, 1996. (R.6, Transcript 47, 122; App. 147, 222) Because of Larsen's exposure to the frigid conditions, he experienced severe frost bite injuries.

The medical records are consistent in that they indicate that the defendant was not on a business trip at the time of the injury as he alleges. (R.6, Transcript 79-80; App. 179-180) The Shawano emergency department record indicates that the applicant made the trip from Milwaukee to check on the mobile home. (Exhibit 1) The medical information was recorded by a nurse, Karen Johnson, at Shawano Medical Center and was taken from the defendant's neighbor, Wallace Seefeldt. (R.6, Transcript 76; App. 176) A Family Health Plan medical record indicates that defendant's wife stated that he was in Shawano attending to the trailer when the injury occurred. (Exhibit 2)

Dr. Lorton, a psychiatrist, who was seen by the defendant, noted in his March 15, 1996, report that the defendant went to the mobile home at the time of his injury for a weekend alone, because he is an avid deer hunter and an outdoor type of person. (Exhibit 3)

The medical records further indicate that defendant abused alcohol. (Exhibits 4-8) Dr. Hanna indicated that the defendant's injury on February 1, 1997, was attributable to "Ethanol abuse." (Exhibit 8) Several medical records indicate that defendant consumed 7-8 drinks per night. (Exhibit 8) (R.6, Transcript 98; App. 198) Dr. Kinney noted that defendant had a "drinking binge" consisting of 6-8 drinks on January 31, 1996. (Exhibit 9)

ARGUMENT

I The appropriate standard of review needs clarification by this court in cases involving a claimed deviation under the traveling employee statute.

This case involves the so-called "traveling employee" provision of the Wisconsin Worker's compensation Act which states:

> "Every employe whose employment requires the employe to travel shall be deemed to be performing service growing out of and incidental to the employe's employment at all times while on a trip, except when engaged in a deviation for a private or personal purpose. Acts reasonably necessary for living or incidental thereto shall not be regarded as such a deviation. Any accident or disease arising out of a hazard of such service shall be deemed to arise out of the employe's employment."

Section 102.03(1)(f), Stats. This provision establishes a presumption that a traveling employee is in the course of employment which can be rebutted by evidence that the employee was engaged in a personal deviation at the time of the accident. *Tyrrell v. Industrial Commission,* 27 Wis. 2d 219, 224, 133 N.W. 2d 810 (1965).

Before embarking on a detailed discussion of the application of the traveling employee statute to these facts, it is first instructive to discuss the applicable statute of review.

The issue of judicial review of findings and conclusions of law from the Labor and Industry Review Commission is codified by statute. Section 102.23, Stats., holds that a court may set aside LIRC's order if LIRC has acted in excess of its powers or if its order depends on a material finding of fact that is not supported by credible and substantial evidence. Section 102.23(1)(d), Stats. Further, a reviewing court is prohibited from finding facts. Section 102.23(6), Stats.

In reviewing a factual determination of an administrative agency, the findings are sustained if based on credible and substantial evidence. See Section 102.23 (6), Stats. It has been held that in examining LIRC's decision, the reviewing court's role is to review the record for credible and substantial evidence which supports LIRC's determination, rather than weighing opposing evidence. See *Vande Zande v. ILHR, Dept.*, 70 Wis. 2d 1086, 1097, 236 N.W. 2d 255 (1975). In fact, it has been held that, "The findings of the [LIRC] must be upheld upon appeal even though they may be contrary to the great weight and clear preponderance of the evidence." *Consolidated Papers, Inc. v. ILHR, Dept.*, 76 Wis. 2d 210, 215, 251 N.W. 2d 69 (1977).

It is instructive to compare this standard of review for an administrative agency's finding to findings arising out of a trial court setting. An appellate review of factual findings is always deferential, albeit in several differing degrees. When an appellate court reviews the factual findings of a trial court, the appellate court will only overturn a finding if it is clearly erroneous – that is if it is against the great weight and clear preponderance of the evidence. See Section 805.17(2), Stats. See also *Wurtz v. Fleischman,* 97 Wis. 2d 100, 293 N.W. 2d 155 (1980).

Greater deference is given to a jury's factual determination. A reviewing court will uphold a jury's verdict, even if it is against the great weight and clear preponderance of the evidence so long as the reviewing court can locate in the record, "any credible evidence" to support the jury's finding. See *Weiss v. United Fire & Cas. Co.,* 197 Wis. 2d 365, 389-90, 541 N.W. 2d Sub 53 (1995). The difference between these two standards is, perhaps, is understandable since in a jury factual finding setting, the trial court also can act as a "gate

keeper" against a manifestly unfair or perverse verdict. The reason for this, of course, is because of the opportunity of the trial court to observe the trial and sense any atmosphere of prejudice. *Willenkamp v. Keeshin Transport System, Inc.*, 23 Wis. 2d 523, 530, 127 N.W. 2d 804 (1964).

In substance, therefore, a reviewing court treats an administrative agency's factual findings as it would treat a jury finding. However, in a case of a jury factual finding, a jury has before it the full exposition of evidence, both in terms of testimony and written documentation and the jury is able to base its decision on the presentation and demeanor of the actual witnesses.

This is not so in a worker's compensation setting. Under statute, LIRC is the ultimate finder of fact. See Section 102.23 (1)(a), Stats. These findings of facts, however, are not based upon actual testimony, but are based upon a review of the sterile written record.[1]

Historically, in the interpretation of cases arising out of the traveling salesman statute, Section 102.03(1)(f), Stats., cases have indicated that both issues of fact and issues of law arise. Indeed, in this case, the Court of Appeals noted that both mixed questions of fact and law arose (App. 301). For example, it has been held that LIRC is called upon to find a question of fact to determine whether an employee is engaged in a business trip in the first instance. *Lager v. ILHR, Dept.*, 50 Wis. 2d 651, 658, 185 N.W. 2d 300 (1971); *Sauerwein v. ILHR, Dept.*, 82 Wis. 2d 294, 301, 262 N.W. 2d 126 (1978).

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[1]Should the credibility of a witness be determinative of a factual finding by LIRC, then due process requires LIRC to have the benefit of the hearing examiner's personal impressions if LIRC reverses its examiner and makes contrary findings. See *Braun v. Industrial Commission*, 36 Wis. 2d 48, 153 N.W. 2d 81 (1967).

There have also, however, been numerous cases addressing the issue of whether a traveling employee engaged in a "deviation" from his employer's business, thereby preventing compensation. Initially, it was held that a finding of deviation was simply a question of fact for the Department to determine. See *Hunter v. ILHR, Dept.*, 64 Wis. 2d 97, 102, 218 N.W. 2d 314 (1974), citing *Tyrrell v. Industrial Commission,* 27 Wis 219, 222-223, 133 N.W. 2d 810 (1965). More recently, however, this court has suggested that the issue of deviation is a question of law. In a recent case addressing the applicability of the traveling salesman statute, to a particular fact situation, the Supreme Court stated:

> Nevertheless, merely labeling the question as a question of law and labeling the commission's determination as a conclusion of law does not mean that the court should disregard the commission's determination. Determination(s) of ("a deviation for a private or personal purpose" of "acts reasonably necessary for living or incidental thereto") call for a value judgment, and judicial review of such a value judgment, though a question of law, requires the court to decide in each type of case the extent to which it should substitute its evaluation for that of the administrative agency.
>
> We have recognized that when the expertise of the administrative agency is significant to the value judgment (to the determination of a legal question), the agency's decision, although not controlling, should be given weight." *CBS, Inc. v. LIRC,* 219 Wis. 2d 564, 572, 579 N.W. 2d 668 (1997).

Giving weight to LIRC's determination, the Supreme Court held that the decision of LIRC will be affirmed if it is "reasonable." *CBS, supra,* at 573.

This standard of review has been called into question. As noted in a concurring opinion in the recently decided case of *CBS, Inc., supra,* the concurrence questioned whether this court has, indeed, shifted the applicable standard of review from a question of fact to one of law, although the concurrence specifically noted that, "This may be a more reasoned approach . . ." *CBS, Inc., supra,* at 586 (Crooks concurring).

A more recent case decided in the context of the traveling employee statute seemed to confirm that decisions regarding employee deviations are, indeed, issues of law. In the case of *Wisconsin Electric Power Co. v. LIRC,* 266 Wis. 2d 788, 595 N.W. 2d (1999), this court dealt with an injury to a traveling employee while sightseeing. In upholding compensability for the employee, this court, in discussing standard of review issues, noted that the application of the traveling employee statute to the facts as found by LIRC presented a question of law. *Wisconsin Electric Power, supra,* at 787. Further, this court also confirmed that its focus on review was the "reasonableness" of LIRC's application of the statute to the facts of the case. *Wisconsin Electric Power, supra,* at 793.

If, indeed, a shift has been made in the applicable standard of review to be used under cases arising out of the traveling employee statute, it is submitted that this change is welcome. As further noted by the concurring opinion in *CBS, Inc.*:

> "In an effort to expedite the interests of justice, however, I conclude that judicial review of LIRC's application of Wis. Stats. Section 102.03(1)(f) has been limited to the extent that it is essentially negated. Such limited judicial review works to insulate from close scrutiny those decisions of LIRC that are arguably unjust as well as those that are just. *CBS, Inc., supra,* at 585 (Crooks concurring).

The uncertain status of whether the Commission's determinations are, indeed, findings of fact or conclusions of law does, of course, affect the standard of review used. In discussing the deference that reviewing courts have traditionally shown to worker's compensation commissions, one commentator has noted:

> Courts have been known to dodge difficult issues of law by calling them issues of fact and then hiding behind the conclusiveness of Board's findings. Arthur Larson & Lex K. Larson, Larsons' Worker's Compensation Law, Section 130.05(1)(c) at 130-34 (2000 Cumulative Supp.)

Confusions and concerns expressed in the past concerning the applicability of the appropriate standard of review, i.e. whether actions under the traveling employee statute involve determinations of fact or law, and the concerns expressed about the degree of deference given the administrative agency in this case present an opportunity of this court to clarify the appropriate standard of review. If the determinations made by LIRC in this case are purely factual then, of course, great deference must be given.

This deference is not absolute. A court has a duty to weigh the evidence relied upon by LIRC to determine whether that evidence is sufficient to justify the finding made. If there is credible, relevant and probative evidence and that evidence, construed most favorably, would justify men of ordinary reason and fairness to make that finding, the evidence is sufficient. However, such a finding should rest upon such evidence and not upon a mere scintilla of evidence or upon conjecture and speculation. *R.T. Madden, Inc. v. ILHR, Dept.*, 43 Wis. 2d 528, 548, 169 N.W. 2d 73 (1969).

The decision of LIRC is an eight page decision summarizing the various testimony at the hearing. The actual finding, of a business trip, is on page four of the decision. In its decision LIRC stated:

> "The credible evidence leads to the inference that the applicant's purpose in going to Tigerton on January 31, 1996, was business related. The applicant had recently discussed his company's service prices with a representative of Aarow Electric, as verified by the applicant's testimony and a copy of a letter from him to Aarow Electric dated January 26, 1996." (R.6; App. 283)

This inference rests on a false premise. LIRC's premise is that there is physical evidence of a "recent" letter to support its finding that Larsen was going to make a cold call on a prospect which had not been a client of his business in almost a decade. In fact,

however, the letter testified to at hearing was not dated January 26, 1996, but, in fact, was dated January 26, 1995.

It was well established that where testimony conflicts with established physical facts such testimony is incredible as a matter of law and a finding based upon such testimony cannot stand. *Corning v. Dec Aviation Corp.*, 50 Wis. 2d 441, 447-448, 184 N.W. 2d 152 (1971).

This same standard applies to worker's compensation cases. In the case of *Pressed Steel Tank Co. v. Industrial Commission,* 255 Wis. 333, 38 N.W. 354 (1948), LIRC ruled in favor of an applicant to the effect that his injuries arose out of his employment. The employer appealed and the trial court overturned the Industrial Commission (predecessor to LIRC) and the matter was taken to the Supreme Court. In upholding the trial court decision, the Supreme Court reviewed the record which turned on an issue of fact as to whether the applicant had sustained a prior back injury. Applicant's supporting physician submitted a report, in favor of the applicant, but the physician admitted that he assumed that the applicant never had a prior back injury, based on the applicant's history. In addressing this particular issue, the Supreme Court noted, "When it appears that the assumed facts do not exist or are not proven, the opinion based thereon must be disregarded." *Pressed Steel Tank, supra,* at 335 (emphasis added).

So too, it appears that LIRC's decision was based on assumed facts which simply do not exist. The applicant was not following up on a "recent" letter in order to make a cold call on a customer who last did business with him ten years ago. Consequently, his testimony

does not rise to even a "scintilla of evidence" to support a finding that Larsen was engaged in a business trip at the time of his injury.

On the other hand, if LIRC's determinations in this case are viewed to be questions of law then, although the agency's determination should be given weight, it also appears that the weight to be given to the agency's decision, especially in the context of a claim under the traveling salesman statute, does call for a "value judgment" which must be "reasonable." *CBS, Inc., supra.*

This court noted that the issue of reasonableness can change with the facts presented. Even in upholding a decision of LIRC granting compensation to a worker injured while sightseeing, this court stated:

> Counsel for LIRC aptly noted in response to questioning at oral argument that this case "pushes the envelope" of the kinds of behavior by traveling employees which might be considered incident to living under Wis. Stats. 102.03(1)(f). *Wisconsin Electric Power, supra,* at 796.
>
> This case breaks the envelope.

Finally, no matter what standard of review is deemed to be appropriate in this case, it should be emphasized that this court does have certain inherent powers to make certain that justice occurs. Under common law, judges traditionally have had the power to grant new trials when it is apparent to the judge that a miscarriage of justice would occur. In fact, as noted by this court, the powers of a judge, "should be courageously and fearlessly exercised whenever a trial judge is convinced that to enter judgment on a verdict returned would result in a miscarriage of justice. It is possible that this important power is used more sparingly that it should be." *Van Gheem v. Chicago & N.W. R. Co.,* 33 Wis. 231, 236, 141 N.W. 2d 237

(1966), citing *Schlag v. Chicago M. & St. P. R. Co.*, 152 Wis. 165, 169, 139 N.W. 756 (1913). This standard has also been codified under Section 751.06, Stats. See also *Vollmer v. Lutey*, 156 Wis. 2d 1, 456 N.W. 2d 797 (1990).

As part and parcel of the inherent authority of the court to protect against a miscarriage of justice, this court has the power to set public policy for the State of Wisconsin. As noted in the case of *Pfiefer v. Standard Gateway Theater, Inc.*, 262 Wis. 229, 238, 55 N.W. 2d 29 (1952):

> . . . In cases so extreme that it would shock the conscious of society to impose liability, the courts may step in and hold as a matter of law that there is no liability.

Applying a "value judgment" standard of review in this case, this court should deny compensation for the reasons set forth below.

II The facts of this case go beyond the "outer limits" of protection given to traveling employees.

This court has issued two recent decisions addressing the interpretation of the traveling employee statute as part of the Worker's Compensation Act. In the case of *CBS, Inc. v. LIRC*, 219 Wis. 2d 564, 579 N.W. 2d 668 (1998), this court upheld a determination that an injury of a traveling employee was compensable when the employee, while working for CBS Television at the Winter Olympics, sustained an injury while skiing on an off day. In the case of *Wisconsin Electric Power Company v. LIRC*, 226 Wis. 2d 778, 595 N.W. 2d 23 (1999), this court, again, concluded that an injury to a traveling employee, while engaged in personal sightseeing, was compensable under the traveling employee statute.

Obviously, the issue of traveling employee compensability is an issue of great interest to employers and employees throughout the state. Given two recent decisions addressing this issue, it is also obvious that the issue of compensability for traveling employees can generate confusion and controversy when it is not entirely clear that the worker is performing service to or on behalf of his employer.

This case presents such a situation.

The traveling salesman statute, §102.03(1)(f), Stats., creates a presumption that an employee who sets out on a business trip is performing services arising out of and incidental to his employment until he returns from his trip. *Lager v. ILHR Department*, 50 Wis. 2d 651, 658, 185 N.W. 2d 300 (1971).

However, the statute provides for an interruption in the employment during such time that an employee is on a "frolic of his own." *Lager, supra,* at 658. To deny recovery, therefore, the statute requires that there must be (1) a deviation by the employee from the business trip, and (2) such a deviation must be for a personal purpose not reasonably necessary for living or incidental thereto. *Hunter v. ILHR, Department*, 64 Wis. 2d 97, 101-102, 218 N.W. 2d 314 (1974).

Liberal construction of the Act is governed by the statutory intent of the law. The court should examine the facts and circumstances and apply the traveling employee's provisions of the Act to them with the help of existing case law to aid in the interpretation of the statute. Doing so demonstrates the unreasonableness of LIRC's conclusion that an employee who travels to a mobile home, owned by him, and often used as a personal refuge

from marital problems and who arrives at the mobile home, after having spent several hours at a tavern, with feed corn to feed animals, is not engaged in a deviation.

In the case of *Hunter v. ILHR Department*, 64 Wis. 2d 97, 103, 218 N.W. 2d 314 (1974), the court defined when a deviation exists by stating:

> Whether there is a deviation depends upon whether there is established in some "...meaningful manifestation to engage in activities purely personal to the employee ... The test depends on whose purpose was served."

Substantial evidence, brought out at the hearing, suggests that Larsen deviated from the course and scope of his employment activities by consuming unreasonably large quantities of alcohol preparatory to arriving at his trailer, with the intent of consuming pizzas, consuming more alcohol, and then allegedly doing office paperwork. Larsen admitted to consuming at least 4 of 5 drinks in less than a 2 hour time period. (R.6, Transcript 31-32; App. 132) Dr. Kinney, in his report, indicates that defendant possibly consumed as much as 8 drinks and was on a "drinking binge" at the time of injury (Exhibit 9)

While the consumption of intoxicants does not automatically defeat a worker's compensation claim, it can be used to demonstrate an intent to deviate from the course and scope of employment. *Dibble v. ILHR Department*, 40 Wis. 2d 341, 350, 161 N.W. 2d 913 (1968). In *Dibble*, the Supreme court commented, "[intoxication] is relevant evidence as to the [applicant's] state of mind insofar as it helps resolve the question of whether the deviation was for private purpose and whether it was an act reasonably necessary for living and incident thereto." *Dibble*, at 350.

Like *Dibble*, Larsen in this case was not contacting any customers or soliciting any prospective customer at or before the time of injury. Furthermore, as in *Dibble*, it cannot be said that the intoxicants consumed by the applicant were in any way a furtherance of his business activities. Importantly, the *Dibble* court commented that:

> While a cocktail or two before dinner probably is an acceptable social custom incidental to an act reasonably necessary to living the department could conclude that Dibble's indulgence was beyond reasonableness. Certainly, at the time of his second trip to the lounge after he had dinner his indulgence was not an act reasonably necessary or incidental to living. *Dibble, supra,* at 350.

It is true that intoxication, per se, does not establish a deviation. See *Phillips v. ILHR Department*, 56 Wis. 2d 569, 202 N.W. 2d 249 (1972). Nor is dining and socializing, even with intoxicants, considered a deviation which would take a salesman out of the character of his employment. *Hansen v. Industrial Commission*, 258 Wis. 625, 46 N.W. 2d 754 (1950).

However, important in the *Hansen* holding is the recognition that the activity, in order not to be deviation, must be an activity undertaken that is ordinarily considered usual and proper. The *Hansen* court recognized that activities such as dining or engaging in other reasonable activity is expected of an individual away from home. The *Hansen* court does not indicate that whatever the individual would do is acceptable or reasonable. The *Hansen* decision further emphasized that to keep the worker within the scope of employment, that worker must be doing the "usual, legitimate things incidental to daily existence." *Hansen, supra,* at 626. It cannot be said that passing out cold on the floor of a mobile home is an activity that is incidental to daily existence.

Wisconsin courts have also addressed factual scenarios which certainly could be argued to involve incidental and necessary activities for living, but have been nevertheless rejected by the court as being non-compensable. The court in *Simons v. Industrial Commission*, 262 Wis. 454, 55 N.W. 2d 358 (1952), was confronted with a factual scenario under which a traveling employee appears to have taken his children to the home of the grandparents for purposes of baby sitting. Seemingly, baby sitting is something that is relatively common and usual and anticipated in our society. The Supreme Court, however, properly limited the scope of compensability and determined that the deviation for purposes of dropping off the children was such a deviation so as to remove the injury from the worker's compensation coverage. In essence, the *Simons* court correctly complied with the legislative intent in determining that personal and private deviations are not compensable.

Similarly, in *Tyrrell v. Industrial Commission*, 27 Wis. 2d 219, 133 N.W. 2d 810 (1964), the worker made a geographic deviation from his normal route and attended a local tavern. The *Tyrrell* court determined that the employment of the worker formed no part of the trip and, as such, found the accident as not arising out of the employment and constituting a personal deviation. See *Tyrrell, supra,* at 226-227.

Courts have also found a personal deviation as a result of geographical deviation where the consumption of alcoholic beverages was not an issue. In the case of *Hunter v. ILHR Department*, Wis. 2d 97, 218 N.W. 2d 314 (1974), LIRC denied worker's compensation benefits to a worker who instead of immediately returning home from a trip to Appleton, chose to drive approximately 40 miles west to test road conditions to determine whether she would either visit a boyfriend or go on a hunting trip. After traveling west for

approximately ½ hour, the worker determined that the road conditions were such that a trip the next day was not advisable. She testified that the second half of her trip was for the purpose of finding a motel in which to sleep or finish her work, clearly work-related activities. However, compensation was denied on the grounds that it was established that "a deviation for personal purposes had already taken place." *Hunter, supra,* at 104.

In *Neese v. State Medical Society*, 36 Wis. 2d 497, 153 N.W. 2d 552 (1967), the court was confronted with an even stronger case for an argument of compensability. The worker in *Neese* was simply engaged in finding a place to eat. However, the *Neese* court properly determined that there were sufficient places to eat in the local vicinity of the worker and there was no need for him to travel much beyond the local community. When the applicant traveled a greater distance in order to find a particular restaurant, he was on a personal deviation which was not compensable.

Finally, one of the most defining cases in this area is the case of *Sauerwein v. ILHR Department*, 82 Wis. 2d 294, 262 N.W. 2d 126 (1978). In *Sauerwein*, the employee engaged in recreation in the form of swimming. Admittedly, the court in *Sauerwein* found that the applicant was not a traveling employee. The court also, however, addressed the applicant's activities and noted:

> The employee is not covered while pursuing purely personal objectives. At the time of this applicant's injury, he was pursuing personal objectives, swimming and socializing with his friends." *Sauerwein, supra,* at 303.

The *Sauerwein* court goes on to further discuss the personal comfort doctrine as follows:

> In this case, the applicant was ministering to his personal comfort at the time of his injury, but his activities were unrelated to his work. *Sauerwein, supra,* at 305-306.

In this case, an employer of a traveling salesman undoubtedly has an interest in the personal comfort of the employee, including reasonable "indulgences" which may include a cocktail or two before dinner. However, engaging in a "drinking binge" and passing out on a floor does not serve any legitimate purpose of any employer.

The court of appeals noted LIRC finding that even if Larsen had deviated from acts reasonably necessary for living by going to a tavern, the deviation had ceased by the time he arrived at his mobile home. The implication here is that no matter what Larsen did, as long as he returned on a path toward an alleged business purpose, any issue of past deviation is irrelevant.

The same type of argument was advanced and rejected by the Supreme Court of Michigan. In the case of *Bush v. Parmenter, Forsythe, Rude & Dethmers,* 413 Mich. 444, 320 N.W. 2d 858 (1982), an attorney left his offices to go to a seminar in his field of expertise. The seminar also included a cocktail hour which he attended. Arguably, this social occasion may have aided the attorney in meeting new business contacts. He then returned to his hometown where his personal "cocktail hour" extended for many more hours. At approximately three in the morning, he then started back toward his home when he was shot and murdered. His widow applied for worker's compensation death benefits.

In denying benefits under the facts of that case, the Michigan court discussed the issue of deviation and whether the attorney, at the time of his fatal injury, was actually returning on a business purpose path. In fact, the Michigan Court of Appeals had determined

that Bush had actually resumed his business trip and held that upon resumption of the trip the employer's liability recommenced.

In overruling this finding, the Michigan court examined the issue of whether the employment nexus was broken prior to the completion of the "round trip." It also examined whether the deviation substantially increased the likelihood of injury. In raising these questions, the Michigan court answered them by concluding that the business detour was so great and unrelated to his business that the deviation dwarfed the business portion of the trip. It further held that the deviation was of such nature in length, that it extensively increased the likelihood of injury and was clearly unrelated to the purpose of employment.

In reaching this conclusion, the Michigan court extensively relied upon excerpts from Professor Larson and noted:

> One thing seems reasonably certain. **An employee who has the right to have his homeward journey covered cannot, so to speak, put that right in the bank indefinitely and cash it at whatever future time suits his convenience. The sheer amount of time elapsed is bound to influence courts in these cases . . . other factors . . . include the amount of risk added by the personal activity, such as drinking, the nature of the job, and the extent to which there may be found an identifiable moment in time at which work duties end and the clock begins to run on the deviation.** *Bush* 858 N.W. 2d at 865, citing 1 Larson, Worker's Compensation Law, Section 19.29, PP4-310-4-320 (emphasis in original).

In its decision, LIRC specifically utilized the "positional risk analysis" and determined that the zone of special danger to which the applicant was exposed was the extremely cold weather in Tigerton the evening of the accident and, it was by reason of an

employment activity (sheltering himself for the night) that Larsen was exposed to this special danger[2]. LIRC's analysis was faulty.

In the case of *Goranson v. ILHR Department*, 94 Wis. 2d 537, 289 N.W. 2d 270 (1980), the court noted that, "the statutory phrase 'arises out of employment,' is not synonymous with the phrase 'caused by employment.' In determining the meaning of the statutory language, the "positional risk doctrine' is applied." *Goranson, supra,* at 555, citing *Cutler-Hammer v. Industrial Commission*, 5 Wis. 2d 247, 254, 92 Wis. 2d 824 (1958); *Nash-Kelvinator Corp. v. Industrial Commission*, 266 Wis. 81, 86-87, 62 N.W. 2d 567 (1954).

The *Goranson* court defined the "positional risk doctrine" as follows:

> Accidents arise out of employment if the conditions or obligations of the employment create a zone of special danger out of which the accident causing the injury arose. Stated another way, an accident arises out of employment when, by reason of employment, the employe is present at a place where he is injured through the agency of a third person, outside force, or the conditions of special danger. *Goranson, supra,* at 555, citing *Cutler-Hammer v. Industrial Commission*, 5 Wis. 2d at 254.

Not all zones of danger are obligations of employment. The *Goranson* court further noted: "An employe may wilfully do a wrong act for purposes entirely foreign to his employment, and while so acting taking himself out of the scope of his employment. . . . Such departure . . . measured in terms of time and space may be very slight." *Goranson, supra,* at 555, citing *Peterman v. Industrial Commission*, 228 Wis. 352, 358, 280 N.W. 2d 379 (1938). As *Goranson* indicates, an employee on a business trip can sustain an injury that does not arise out of his employment. An employee who, while on a trip, engages in

---

[2]It appears that the Wisconsin "positional risk analysis" is analogous to the Michigan analysis concerning whether a deviation broke an "employment-injury nexus."

unlawful or immoral behavior, unconnected to the business nature of the trip and who is injured as a result, has not sustained an injury, "arising out of a hazard" of the trip even though the employee may otherwise be within the time and space limits of a trip.

In *Goranson* the applicant was a bus driver whose work took him to Green Bay. As part of his work activities, his employer also put him up in a hotel. On the date of his accident, it appeared that he either jumped or was pushed from the third floor ledge of his room under uncertain and certainly unusual circumstances. There was testimony that Goranson had been drinking and, perhaps, he also may have had companionship in the room with him.

Although the conditions of his employment took Goranson to the third floor of a hotel, at the time of his injury, the conditions of his employment did not take Goranson to the window ledge from where he either jumped or fell. As noted by the Supreme Court, "The situation in which Mr. Goranson found himself was not one which was created by the risk of staying at the hotel." *Goranson, supra,* at 557.

In its decision, however, the Court of Appeals held that Heritage's analogy to the *Goranson* case failed because of this court's subsequent decision in the case of *Weiss v. City of Milwaukee*, 208 Wis. 2d 95, 559 N.W. 2d 588 (1977). The Court of Appeals noted language from the *Weiss* decision stating:

> [T]he [***Goranson***] court determined that the accident did not arise out of the driver's employment, because the injury force was purely personal to him.
>
> The facts of this case are distinguishable from those in ***Goranson***. In ***Goranson***, the bus driver's employment did not contribute to or facilitate the accident causing the injury he suffered jumping from the hotel window. *Weiss, supra,* at 108.

Adopting the *Weiss* distinction, the Court of Appeals noted that LIRC found that Larsen, "when injured ... was simply attempting to enter his domicile for the night, an act reasonably necessary for living." The Court of Appeals then held that this was not an unreasonable finding. (App. p. 307)

Obviously, it is clear that exposure to cold weather related conditions can result in compensability. See *Eagle River B. & S. Co. v. Industrial Commission*, 199 Wis. 192, 225 N.W. 690 (1929); *Ellinson Lumber Co. v. Industrial Commission*, 168 Wis. 227, 159 N.W. 568 (1918). However, it is clear that compensability in those cases arose because the cold weather exposure was a hazard of employment related activities.

However, what is ignored by both LIRC and the Court of Appeals is that in this case Larsen's activities, even if employment related, did not expose him to a zone of special danger. Although Larsen did not suffer any injury until after he sought shelter for himself for the evening, the Court of Appeals ignored the distinction between the need for an employee to shelter himself for the night and the employee's action or inaction, purely personal to him, in failing to adequately secure shelter. There is no suggestion whatsoever that the shelter itself was inadequate. The trailer was, in fact, heated. Larsen himself admitted that the frozen pipes thawed after the door of the trailer was closed. (R.6, p. 78) What was inadequate about the shelter was the act of entering the trailer, passing out on the kitchen floor, and failing to close the door.

These are factors wholly personal to Larsen and not due to any work related requirements.

III There is credible evidence in the record to support the finding that Larsen's intoxication caused his injuries.

In its decision, LIRC specifically found that at the time of his injury, Larsen was intoxicated and that his intoxication was a substantial factor in causing his injuries. The trial court overturned this finding, however, indicating that although Larsen may have been intoxicated, there was an absence of evidence that the intoxication caused his injuries.

Initially, it should be noted that the standard of review issues set forth above are also important considerations in addressing the intoxication issue. If this court holds that factual findings are involved which are to be upheld if supported by credible and substantial evidence, then it is difficult to see how LIRC's finding regarding intoxication can be overturned.

If this court concludes that the intoxication issue is a conclusion of law and the administrative agency's determination should be given great weight then, again, it is difficult to see how LIRC's conclusion of intoxication could be overturned.

In fact, at the lower court level, LIRC strenuously argued the proposition that any finding of the Commission must be upheld if supported by any credible evidence. Yet, in briefing before the Court of Appeals, LIRC was totally silent as to the circuit court's reversal of the Commission's finding of intoxication so as to reduce compensation pursuant to Section 102.58, Stats.

Instead, LIRC indicated in a footnote in its appellate brief that it "now acquiesces" in the circuit court's finding as to this particular issue. Left silent in this "acquiescence" is

an understanding of how the Commission could be wrong on this issue, given the review standard previously proposed by LIRC.

Perhaps, LIRC will enlighten this court as to the appropriate standard of review to be followed not only as to findings made under Section 102.03(1)(f), Stats., but also Section 102.58, Stats. It can, perhaps, also enlighten this court as to why whichever standard of review is applied, certain factual findings or legal conclusions should be upheld and why other factual findings and legal conclusions should be overturned.

Regardless, of the standard of review applied, LIRC decision in this case provides for troubling evidentiary issues. While it is true that an employer bears the burden of proof to sustain a 15% reduction in compensation pursuant to §102.58, Stats., *Haller Beverage Corp. v. ILHR Department*, 49 Wis. 2d 233, 181 N.W. 2d 418 (1970), it is also true that this burden is not synonymous with an impossible standard.

It is well settled that an opinion of intoxication does not require expert testimony and a lay witness is competent to give an opinion as to intoxication. *City of Milwaukee v. Antczak*, 24 Wis. 2d 480, 128 N.W. 2d 125 (1963). Further, to prove intoxication it is not necessary to have scientific testimony and, in fact, even blood tests on the issue of intoxication are not in and of themselves conclusive. *Baird v. Cornelius*, 12 Wis. 2d 284, 293, 107 N.W. 2D 278 (1960). Further, even the scientific testimony of a chemist is not sufficient to determine the effect that alcohol would have on an individual defendant. See *State v. Bailey*, 54 Wis. 2d 679, 196 N.W. 2d 664 (1972). Moreover, the Supreme Court has even taken judicial notice of the fact that, "intoxicants affect people in different ways and

even the same person differently depending upon the circumstances." *City of Milwaukee v. Johnston*, 21 Wis. 2d 411, 124 N.,W. 2d 690 (1963).

Given these widely varied standards to determine intoxication, and the effects thereof, LIRC must, as a matter of necessity, be given latitude to reach its findings. In fact, the Supreme Court has already declared that in regard to certain subjects LIRC possesses its own level of expertise or expert knowledge. *McCarthy v. Sawyer-Goodman Co.*, 194 Wis. 198, 205, 215 N.W. 824 (1927); *Anheuser Busch Inc. v. Industrial Commission*, 29 Wis. 2d 685, 139 N.W. 2d 652 (1965).

In this case, of course, LIRC did not simply have the testimony of the applicant, Larsen, available to it. LIRC also had numerous and extensive medical records as well.

LIRC had before it the consultation report of Dr. Goldmann noted: "After a drinking binge consisting of 6 - 8 drinks, he attempted to go home about 6:00 at night."

LIRC had before it a psychiatric consultation of the Family Health Plan where in it was noted: "He apparently had gone into the mobile home and not shut the door tightly and he had had several drinks and passed out."

Finally, the Commissioner had before it a renal consultation performed on February 2, 1996, by Dr. Matthew Hanna wherein Dr. Hanna states:

> Consultation is regarding acute renal failure rhabdomyolysis. This 54-year-old white male with a history of heavy ethanol use and smoking presented to his local emergency department yesterday with frostbite injury to the hands, face and feet.
>
> He reports "passing out" in a mobile home on the evening of January 31, 1996, after having several drinks and awoke 8-9 hours later in an unheated trailer. He presented to his local emergency department with severe frostbite injury to the hands evidence as well as involving the nose and ears and feet.

... IMPRESSION:
1. Ethanol abuse
2. Loss of consciousness secondary to the above. ...

LIRC could reasonably interpret this specific evidence in conjunction with its own expertise as sufficient to establish the necessary, "causal link between the intoxication and the injury." *Haller Beverage, supra.* Such a determination was within the fact finding authority of LIRC and it is also noted that the drawing of reasonable inferences from ambiguous, incomplete, or even indefinite medical evidence is the exclusive function of the Commission. *Ruff v. LIRC*, 159 Wis. 2d 239, 245, 464 N.W. 2d 56 (Ct. App. 1990).

Here, the trial court, affirmed by the Court of Appeals, disregarded the conclusions of LIRC, based on the medical records. Apparently, a higher standard of proof is now required to show not only intoxication but the specific effects of intoxication on each specific employee. How this can be done, in light of this court's judicial notice that intoxication can cause different effects depending on the circumstances, is unknown. See *City of Milwaukee v. Johnston, supra.* The Court of Appeals has given no guidance as to the required level of proof needed to establish a reduction of benefits pursuant to §102.58, Stats. This court should assist employers to determine what level of proof is necessary. It should hold that a finding of intoxication, in conjunction with medical testimony, as part of the record in a particular case, is sufficient.

CONCLUSION

Because a decision by this court will help develop, clarify and harmonize the law, which is continuing to be developed concerning the traveling employee statute, and because it is submitted that the facts in this case represent the "outer limits" of compensability under the traveling employee statute, and because the issue of the required level of proof for a reduction of compensability, because of intoxication, is uncertain, Heritage respectfully requests that this court over-rule the Court of Appeals and hold that Larsen is not entitled to compensation, under the Worker's Compensation Act for his injuries.

If this court determines that compensation is warranted, it should reinstate the fifteen percent (15%) compensation reduction pursuant to Section 102.58, Stats.

Dated this 12th day of October, 2000.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief and appendix produced with proportional serif font. The length of the brief is 8808 words.

This brief was prepared using WordPerfect word process software. The length of the brief was obtained by use of the Properties Information function of the software.

Dated this 12th day of October, 2000.

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SUPREME COURT OF WISCONSIN

HERITAGE MUTUAL INSURANCE COMPANY and
LARSEN LABORATORIES, INC.,

Plaintiffs-Appellants-Petitioners,

v.

Court of Appeals
Case No. 98-3577

WILLIAM E. LARSEN and
LABOR AND INDUSTRY REVIEW COMMISSION

Trial Court
Case No. 98-CV-003116

Defendants-Respondents.

APPENDIX OF PLAINTIFFS-APPELLANTS-PETITIONERS, HERITAGE MUTUAL INSURANCE COMPANY AND LARSEN LABORATORIES, INC.

Milwaukee County
Judge Michael G. Malmstadt

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APPENDIX

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STATE OF WISCONSIN

DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS

Worker's Compensation Division

****

WILLIAM LARSEN,

Applicant,

vs. Case No. 96-021617

LARSEN LABORATORIES, INC. and

HERITAGE MUTUAL INSURANCE,

Respondent.

****

TRANSCRIPT OF PROCEEDINGS

at

Milwaukee, Wisconsin

May 21, 1997

PRESIDING:

HONORABLE RONALD RYAN

ADMINISTRATIVE LAW JUDGE

Janice Kuharske

Official Reporter

STATE OF WISCONSIN

DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS

Worker's Compensation Division

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WILLIAM LARSEN,

Applicant,

vs. Case No. 96-021617

LARSEN LABORATORIES, INC. and

HERITAGE MUTUAL INSURANCE,

Respondent.

****

Pursuant to notice, this matter came on for hearing at the City of Milwaukee, Wisconsin, on the 21st day of May, 1997, beginning at 8:00 a.m.

PRESIDING:

HONORABLE RONALD RYAN

ADMINISTRATIVE LAW JUDGE

A P P E A R A N C E S

APPLICANT, In person and by his attorneys, SCHIRO & WARD, by Robert T. Ward.

RESPONDENT, Employer and its insurance carrier by their attorneys BORGELT, POWELL, PETERSON & FRAUEN. by Shawn Eichorst.

STATE OF WISCONSIN

DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS

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I N D E X

STATE OF WISCONSIN

DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS

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Respondent.

****

E X H I B I T S

APPLICANT'S

A	WKC-16 from Dr. Greg Watchmaker
B	Certified Medical Records from Curtis Emergency Medical Services
C	Letter from Schiro & Ward to Dr. Greg Watchmaker
D	Certified Medical Records from Dr. Harvey M. Bock
E	WC-3 and Mileage Claimed
F	Applicant's Business Card
G	Letter to Rex Harrison from Applicant
H	Invoice Records from 1987 and 1988
I	Sprint Telephone Invoice
J	Log Excerpt from January, 1955

RESPONDENT'S

1	Recorded Statement of 4-5-96
2	Letter to Workforce Division from Schiro & Ward
3	Certified Medical Records from Shawano Medical Center
4	Certified Medical Records from Appleton Medical Center
5	Certified Medical Records from St. Luke's Medical Center
6	Certified Medical Records from Family Health Plan
7	Discharge Summary from Mount Carmel Health & Rehabilitation
8	Amendment to Answer from Shawn M. Eichorst
9	Certified Medical Records from Dr. Greg Watchmaker
10	Heritage Insurance Policy for Larsen Industries, Inc.

P R O C E E D I N G S

(Applicant Exhibits A - J marked.)

(Respondent Exhibits 1 - 10 marked.)

JUDGE RYAN: We'll go on the record at this time.

This is a hearing in the matter of William Larsen versus Larsen Laboratories, Inc., and Heritage Mutual Insurance Company.

The applicant is here in person and is represented by Attorney Ward.

The respondents are represented by Attorney Eichorst? Did I say that right?

MR. EICHORST: That's correct.

JUDGE RYAN: Received by stipulation at this times are Applicant's Exhibits A thru J; Respondent's Exhibit 1 and Respondent Exhibits 3 thru 9, and in about 5 minutes I'll be inviting the attorneys to argue their objections and reasons for and against the receipt into evidence of Exhibits 2 and 10.

(Applicant's Exhibits A - J received.)

(Respondent's Exhibits 1, 3 - 9 received.)

JUDGE RYAN: Conceded are jurisdictional facts, an average weekly wage of $576.92 as of January 31, 1996. That-- Strike that.

The issues in dispute are whether applicant experienced

an accident or disease causing injury arising out of his employment while performing services growing out of and incidental to the employment, the nature and extent of disability, liability for medical expenses, whether notice was provided under the provisions of 102.12. Whether Section 102.58 should be complied to decrease compensation by 15 percent.

Whether there has been overpayment made based upon a mistake of fact, and I might be repeating the medical expense issue, the claim there to date is for $74,845.72.

The claim for temporary total disability is from February 1, 1996 through today's date and continuing. The alleged amount of overpayment is $3,846.70-- I'm going to-- I guess I have old information on that. The WC-13 that was given to me today indicates that $3,461.58 was paid rather than the amount typed in on the Answer.

MR. WARD: I suppose I should look at that.

JUDGE RYAN: Pardon me?

MR. WARD: I suppose I should look at that.

JUDGE RYAN: Okay, we'll recess at this time.

(Recess taken.)

JUDGE RYAN: Okay, we'll go back on the record. At this time I have just confirmed and my

assumption was correct that the $3,461.58 figure today is the accurate figure as opposed to the one slightly higher that was entered on an Answer that was filed back in July of 1996.

I'm going to also assume, and I'm sure I'm correct on this, Attorney Ward is requesting an Interlocutory Order to address any issues that aren't dealt with today for future disability, certainly the T.T.D. claimed. He has indicated that it is through today's date and continuing, and he'd want a further hearing on that and permanent disability, perhaps disfiguring and whatever else he wishes to tell me about after I check with the attorneys now as to whether I have recited today's issues correctly and summarized whatever else we covered before going on the record completely and correctly.

Do you agree that I've covered all those things correctly, Attorney Eichorst?

MR. EICHORST: I believe you have, Judge.

JUDGE RYAN: Attorney Ward, same question. Did I recite the issues correctly and did I summarize it completely and correctly and if yes, yes, is your answer, then I'll ask you to-- Let's do it this way, let's cover one exhibit at a time.

Make your argument on 2 and then I'm going to let him

respond, and then we'll come back to you for 10 and he'll respond to that.

MR. WARD: You did recite the issues correctly. You assumed correctly that I was requesting an Interlocutory Order given that the dispute in the case is primarily compensability. If you should find that the injuries are compensable under the act, I think it would be appropriate to issue an Interlocutory Order of all issues except of course those that you decide by your decision in regards to today's hearing, which would be the medical expense and the temporary total disability to date issues.

MR. EICHORST: And the medical expense to date issues.

MR. WARD: In that the medical expense is ongoing, temporary disability is ongoing, there's obviously significant permanent partial disability and you mentioned some disfigurement perhaps, so I guess what I'm asking for is an Interlocutory Order on those issues.

MR. RYAN: Not too many years ago we used to refer to those as liability hearings. Now that word never appeared on the hearing notice, but it was used by the examiners, the teacher, Harry Linhert, and Hugh Russell.

Okay. Exhibit 2, objecting why?

MR. WARD: Well they're hearsay documents. They're letters from me.

JUDGE RYAN: Okay, hearsay. Any other reason?

MR. WARD: No.

JUDGE RYAN: Exhibit 2, a hearsay objection.

MR. EICHORST: Well, Judge, I think they're business documents provided to the Department and ourselves for the purpose of indicating that Mr. Larsen had changed addresses, and I think the changed address will be an issue in this case.

I don't see-- I don't see where there's a hearsay problem because they've been sent to the Department, they've been sent to us, they're part of the record I believe.

MR. WARD: Here's my problem. I don't know if Mr. Larsen's going to verify or not verify the information in the letters.

Assuming he does not verify the information in the letters, then the way that you would verify the letters themselves is by calling the author of the letter.

I don't intend to become a witness at this hearing, so I'm objecting that this is a hearsay document.

He can verify the information in the letters and then

we don't have a problem.

JUDGE RYAN: Okay. I'm going to not receive Exhibit 2 even though it's possible if you're not offering it for the truth of the matter that's contained therein, although it sounds like you are, but I think the material facts with regard to whatever is stated in that 2-page exhibit is going to come out with other supporting evidence or-- and if it doesn't we'll call for it, so let's move on, that's not received. Exhibit 10, argument?

MR. WARD: Relative to Number 10 I hadn't seen it prior to today.
It's my understanding that it's purported to be a policy of insurance applying to Larsen Laboratories. I don't know that and I think testimony is required in order to verify what that document is.
So I guess it's a hearsay objection in that there isn't any verification in what this document is.

JUDGE RYAN: Regarding 10?

MR. EICHORST: I believe that the cover page is a certification of what it is.
It's-- It's-- It's the Larsens business policy for the business in question and I will be offering testimony in regard to the fact that our clients had a written policy with the Larsens to substantiate that.

Even though I don't think he has to.

MR. WARD: I guess I'd like to hear the testimony, and if I hear the testimony I imagine I'll stipulate to the admission.

JUDGE RYAN: Okay. I'll defer my ruling on that, but based upon the arguments by the two attorneys, I'm almost certain I'm going to receive that Exhibit 10, but I'll hold off on that right now. All right. I think that finishes the housekeeping and your first witness, Mr. Ward.

MR. WARD: I'll call Mr. Larsen, William Larsen.

WILLIAM EDWARD LARSEN, APPLICANT, DULY SWORN

Direct Examination

By Mr. Ward:

Q State your name, please?

A William Edward Larsen.

Q And your current address, Mr. Larsen?

A 2616 East Holmes Avenue, Cudahy, Wisconsin.

Q And that's 53110?

A Correct.

Q How old are you?

A 55.

Q And how far did you go to school?

A I graduated high school and I took additional courses

relating to foundry business and metallurgical courses.

Q All right. It's my understanding that prior to-- up to January 31st of 1996, you were employed by a business called Larsen Laboratories; is that correct?

A Yes.

Q What is the business of Larsen Laboratories?

A Larsen Laboratories is a commercial testing lab for metals.

Basically we do spectrographic analysis and we do physical testing which is tensile strength, yield strength, elongation, reduction of area and Bernell hardness.

Q You are an independent lab, that is to say that you are not connected with any foundry or other manufacturer; is that correct?

A That's correct.

We do do work for foundries but we're not connected with them.

Q Prior-- And it's my understanding that Larsen Laboratories was established in 1980; is that correct?

A Correct.

Q And you established Larsen Laboratories along with your wife Ida Mae; is that correct?

A Correct.

Q Prior to 1980 how were you employed?

A I was employed with Analytical Process Laboratories. It was a commercial testing laboratory and it was a 3-way partnership, it did not work out.

Q How long did you work for that firm?

A Ball park, year and a half, 2 years.

Q And did you have relevant employment prior to working for Analytical? In other words, relevant to the metal testing business.

A Well my background is foundry related. I was employed with Latrobe Steel Company in their Foundry Division for 15 and a half, 16 years, dealing with metals and foundries.

Q You said Latrobe?

A Latrobe Steel Company.

Q Is that in Pennsylvania?

A Correct.

Q I see. And you said about 16 years you worked for Latrobe Steel?

A Yes. Actually I worked for their Cast Master Division. I worked in Racine, Wisconsin, I worked in Latrobe, Pennsylvania, and I worked in Bowling Green, Ohio.

Q Now let me focus in on the business of Larsen Labs a little bit more.

If I understand the nature of the business you would perform testing on metal products that were sent to you

by other manufacturers; is that correct?

A Correct. Primarily foundries, but really anyone dealing with metals that needed to know the chemistry or physical properties is a potential customer.

Q All right. And starting in 1980 you've already indicated you started the business with your wife, Ida Mae. Did you have any other employees when you started the business in 1980?

A Boy, you're stretching my memory, but, yes. We have, I consider them sons, but 2 of my sons that have worked for us basically since day one.

Q From day one, what was the nature of your responsibilities for Larsen Labs?

A Well, wear many hats. Primarily my responsibilities is in the sales end.

Other responsibilities, maintenance on the equipment such as the spectrograph, lathe, tensile tester, programing of the spectrometer, but basically the main function was sales.

Q Well when you first started in 1980 I'm going to assume that Ida Mae didn't have a background in metal testing; is that correct?

A Correct. Right.

Q And so when you started Larsen Laboratories in 1980 it would have required your expertise to perform a test

that needed to be done in order to run the business; is that correct?

A Correct.

Q Did that gradually evolve over time where other employees developed an expertise in the testing area and you gradually devoted a little more of your time to sales?

A Correct.

Q Okay. Let me talk about the operation of Larsen Laboratories in January of 1996 which is the month of the injury, okay?

A Okay.

Q About how many employees did you have at the time?

A Basically we're a small operation. It's 2 sons, Ida Mae, myself, we've got a third son that if we need him he works for us, if we don't, he doesn't.

It's as-- as-- as he's needed.

JUDGE RYAN: You--

BY MR. WARD:

Q Now as of January-- Go ahead.

JUDGE RYAN: You asked for a number and did I count correctly, three employees?

THE WITNESS: Well actually there's--

JUDGE RYAN: No, give him the answer to his question.

THE WITNESS: Ida Mae, 2 sons, myself, full-time employees, a third son, when needed, if needed.

BY MR. WARD:

Q Okay. So as of January, 1996, Larsen Laboratories employed yourself, your wife, 2 sons of Ida Mae from a previous marriage; is that correct?

A Correct.

Q And sometimes another son worked on an as needed basis, correct?

A Correct.

Q All right. Did you have a job title as of January of 1996?

A Well, President, laboratory manager.

Q Those 2?

A Well, yeah, basically.

Q And as of January, 1996, what job responsibilities did you have?

A Primarily sales again, any computer programing that was required, maintenance of the spectrograph, maintenance on tensile tester and/or lathe. Basically, you know, it's a small operation.

Q As of January of 1996, Larsen Laboratories was located where?

A 250 East Oak Street, Oak Creek, Wisconsin 53154.

Q When you say you were principally responsible for sales, how is it that you would market the services for Larsen Laboratories to potential customers?

A Well a combination of ways, primarily by phone. By phone and visiting customers. Basically use a directory, state directory. In this directory it lists potential customers such as foundries and lists them, and you either call them on the phone and/or you go out and see them.

Q Are you talking about that large blue book that's published by the Wisconsin Manufacturer's Association?

A Correct. We-- we- We have them, Bob, for, I don't know, 15 different states.

Q I see.

A We have business in Pennsylvania, Texas, on and off.

Q Okay. So that your business itself was not limited to doing business with foundries or the manufacturers in the Wisconsin area, but you actually do business throughout the country; is that correct?

A Well as far away as Texas and Pennsylvania.

Q Okay.

A There's a lot of states we're not doing business in that we would have liked to, Bob.

Q Well I don't want to leave the impression that you were doing business in all 50 states, but it did involve

doing business with states relatively far away such as Texas or Pennsylvania?

A Yes.

Q Now you indicated that a large percentage of the sales work that you performed you performed over the phone.

A Correct.

Q Did your position as a salesman for Larsen Laboratories also involve traveling?

A Yes, it did.

Q Under which circumstances would you travel as of January, 1996 in connection with your employment as a salesman for Larsen Labs?

A Are we talking the day of the accident?

Q No, I'm asking just generally what circumstances would require you to leave the laboratory and go and make a sale?

A One-- One that comes to mind, we had a potential customer in Indiana, and I'm drawing a blank on the name of it, but it was in Indianapolis, and he had requested that I come out and discuss testing with him, so basically I went out and I met this gentleman and on the same trip I stopped and visited 3 other foundries, the other 3 foundries unannounced.

One of the foundries I visited north of Manchester was a previous customer that we had a number of years ago

that we had lost.

Q Now are you talking about a sales trip that occurred in or around January of 1996?

A No, this was-- that sales trip was I'm going to say March or April of 1995.

Q And I think you indicated that this sales trip itself was triggered by a request from a-- either a potential or existing customer in Indiana requesting that you come down there.

A Yeah, I believe it was Gold Castings in Indianapolis. But I had written a letter about that, Bob.

Q Well the Judge doesn't know about the letter, so I'm going to have you testify about that.

A Oh, okay.

Q The-- If I understand correctly you basically had an appointment to see somebody in Indiana and in connection with that trip you also made various what I would call cold calls, that is calls on businesses for which you were not providing services and for which you did not have an appointment.

A That's correct. I stopped at Essex Castings, no appointment, I talked to Jeff Drewery.

I stopped at, oh, another foundry that wasn't a customer of ours, Cunningham Pattern, I was going to talk with a Ken Hauser. Ken wasn't there that day and

if I recall correctly I talked to a Jim that was out in the shop.

Q How frequently would you in connection with your employment as a sales person make calls on various businesses that were non-existing customers?
How frequently would you do that?

A Basically, Bob, I tried to cover-- I can cover more ground on the phone then I can at a plant.
When I would visit customers, potential customers, it's one-- If I couldn't get the business over the phone--
In other words I talked to them, and if they were reluctant, sometimes I found that if I go out and personally talk with them that I would get the business.

Q So most frequently you would make cold calls on potential customers after you had tried to obtain their business by the phone and you were unsuccessful.

A 99 percent of the time, yes.
Mostly, yes.

Q Let's talk about January 31, 1996.
Where were you living as of January 31, 1996?

A 2616 East Holmes Avenue.

Q And what address were you working out of as of January 31, 1996?

A 250 East Oak Street at the lab.

Q At the laboratory itself?

A Correct. The entire month of January, Bob.

Q If I understand what you're prepared to say is that you were intending to travel to Tigerton, Wisconsin on January 31, 1996; is that correct?

A That is correct.

Q And what was your intention in making that trip?

A My intent was to visit Arrow Electric Casting or foundry who was a previous customer.

My intent was to visit them that following morning and they're located in Shawano, Wisconsin.

And it was a cold call, Bob. I did not have an appointment and if I didn't get in Thursday, I would go back, and if I couldn't see the proper person, I'd go back Friday.

Q Did you express your intention to travel to Tigerton and then Shawano with anyone that worked for Larsen Labs? Telling anyone at Larsen that this is what you intended to do on this trip?

A Okay. This was discussed with Ida Mae--

Q Ida Mae is your wife, correct?

A Correct. Also a business partner. She owns 50 percent of the business. We had discussed it a couple times before my leaving.

Also on that day Ricky and Kelly Salvos were on their

lunch hour, if I recall it was around 12:30 in the afternoon, they were on their lunch hour and I had mentioned to them that I was going to the sales office in Tigerton, and at that time the following day they were to fax the print-outs from the computer to me up there.

Q Okay. Well, we're getting a little bit ahead of ourselves.

It's my understanding that on this trip you intended to stay at a property that you and your wife own in Tigerton; is that correct?

A Correct.

Q If I understand correctly it is a trailer on a piece of property that you own, correct?

A Correct.

Q You had owned this particular piece of property beginning when?

A Well, it's 6 years now so it would be about 1991 that we put the mobile home on it.

Q And if I understand correctly you put the mobile home on the land to accommodate for work purposes as well; is that correct?

A Initially when we purchased the land and the mobile home it was more or less a recreation getaway. In the following 1993 we made a decision to basically make an

office out of part of that. It consisted of a fax machine, a typewriter, a telephone, desk, Rolodex with the customers names. Basically it was a sales office, Bob.

Q In addition to visiting Arrow Electric it was my understanding that you had brought some paperwork along to do in connection with your trip; is that correct?

A That is correct.

Q Was that your typical pattern, if you were on a sales trip that you would take paperwork along to kind of fill in the gaps between the calls that you were making?

Would you typically do that?

A Well, typically it's-- You know, with Arrow Electric I didn't know for sure how long I was going to be tied up there, and if I had free time, which I thought I would, I would work on other sales work and sales calls.

Q So from 1993 on you were using the Tigerton trailer both as a recreational facility and periodically you'd use it as a sales office as you called it, correct?

A M-hm.

Q Is that correct?

A Correct.

Q All right. I'm showing you what's been marked as Applicant's Exhibit F, can you identify for the record

what that is.

A Sure can. It's one of my business cards.

Q Do you know when you started using this particular business card?

A No, I don't know when we started using it, but it was used well before the accident.

Q Well prior to January 31--

A Yes.

Q --1996; is that correct?

A That is correct.

Q All right. And on the business card there is a listing for a lab phone number, correct?

A Correct.

Q There is also a listing for a fax phone number, correct?

A Correct.

Q Which is the same as the lab.

How does that work?

A Basically we have 2 incoming lines at the lab and we get more outgoing on the fax then we do incoming, so basically when you get an incoming you push a button and it accepts incoming.

Q Gottcha.

And then there's a listing for sales, correct?

A Correct.

Q And that number is 715-535-3172, correct?

A That's correct. That's also the fax number up north.

Q That is the phone number for the Tigerton mobile home about which you've been testifying, correct?

A Correct.

Q How frequently would you travel to this Tigerton mobile home once you bought it?

What's the frequency of use?

A Personal or business or a combination?

Q Well a combination to start with.

A Well initially when we first purchased it it was used primarily on weekends.

Like I say back in 1993, you've got dates there, it was used basically primarily as a sales office for the lab. Evenings and weekends, you know, while we were up there, we used it for recreation.

Q Okay. Well I want to talk about the use of the mobile home a little bit more.

If I understand correctly you are an avid hunter, correct?

A Avid deer hunter. I basically hunt deer with a bow and a gun.

Q All right. You don't normally hunt other things like turkey or, I don't know, rabbits?

A I haven't yet. I thought about it, but I haven't.

Q Okay. You're a deer hunter.

A Yes.

Q And you would use this particular facility as deer hunting quarters, correct?

A Correct.

Q It's my understanding that deer hunting season runs from-- bow hunting starts at about September, ends in November, gun hunting runs for a couple or two weeks in November to the beginning of December, am I right on this?

A Well, you're close. Basically bow and arrow opens the 3rd weekend in September, they close it on a Sunday before Thanksgiving, the weekend before Thanksgiving. Gun season only runs 9 days, it starts the Saturday before Thanksgiving, it runs through the following Sunday, and then we close for another 4 or 5 days. In the first part of December bow hunting opens up and it lasts until December 31st.

Q Okay. Are there-- Is there any hunting season in effect as of January 31, 1996?

A There's no deer hunting season. There is-- If you're a property owner, you can hunt certain types of small game year round such as rabbit, I believe 'coon, and maybe a few others, but I've never hunted them, Bob.

Q Okay. So what percentage of the time in late 1995

early 1996 would you say you used the Tigerton address as a business office?

A Late 1995?

Q You know, at or around the time of our injury here is what I'm trying to focus on.

A December I do not recall using it as a business office. December or January-- December of 1995 and January of 1996, prior to using it for Arrow Electric, I do not recall using it as a business office.

There was-- I'd say the bulk of 1995 it was used as a sales office.

Q All right. The-- On January 31, 1996 I'd like you to describe for the Judge the events of that day.

A Well basically Kelly and Rick Salvos, stepsons or sons, I consider them sons, were on their lunch hour. I had mentioned to them that I was going up to the sales office. To fax whatever computer print-outs there were the next day, fax them up to me, I'd review them, and I'd fax the results back to them.

I left here about 12:30. To the mobile home it's about 155 miles which normally takes me about 3 hours.

I drove up to Tigerton which is about 5 miles from the mobile home, and I stopped there at the Red Owl Food Store. I picked up some groceries. I stopped in at the Tigerton Feed Mill, I picked up some shelled corn.

From there I left Split Rock-- I stopped at Split Rock Inn which is, well basically believe between Tigerton and the sales office.

I stopped there I had--

Q Let me stop you there a minute.

If I understand correctly you left the Oak Creek laboratory at 12:30 in the afternoon?

A Well approximately.

Q All right. You weren't writing it down at the time.

A No, I was not.

Q We're looking for your best estimate now, all right?

A Okay.

Q And you said that it was about 155 miles, correct?

A Correct.

Q So it takes about 3 hours to drive up there so your best recollection is you might have got up there around 3:30 or so, correct?

A Approximately.

Q You stopped at the grocery store?

A Correct.

Q You stopped at the feed mill and the purpose for stopping at the feed mill was what?

A Well basically what I do if I'm up there, Bob, in December, January and February, during the cold months I usually buy shelled corn if I'm up there and I just

basically dump it out on the ground and the game, mainly deer and turkeys or whatever come in and feed on it.

Q It keeps the deer coming around so that come next September you can shoot them.

A Well, I wish it did.

Basically I feed them there-- I feed them and then they go over by my neighbors after I get done.

No, they don't have any loyalties.

Q Okay. So then you indicated the 3rd stop that you made was at the Split Rock Tavern, correct?

A It's a tavern-- I don't know what you could call it. They serve hamburgers there once in a while, cheeseburgers.

They have a Friday fish fry, but basically I stopped and had a few drinks, that was my intent. Relax a little bit.

Q And how far is the Split Rock Tavern from the Tigerton Mobile home?

A Three and a half miles.

Q While you were at the Split Rock Tavern, give me your best estimate as to how many drinks you had. What would that be?

A My best estimate would be 4 or 5.

Q From reviewing the statement that's been filed, it

appears that you were drinking a drink, Kessler and Diet Coke; is that correct?

A Yes.

Q Prior to January 31, 1996 was it your habit at the end of the day to have drinks?

A Well I would say fairly routine, Bob. It was not uncommon for me to have 4 or 5 mixed drinks. I normally-- Yeah, I would say normally 4 or 5.

Q So this was not an unusually event for you?

A No, but it wasn't 7 days a week either.

Q All right. About how many days a week would you follow this sort of pattern?

A Well, 4 or 5.

Q Okay. What's your best estimate as to when you arrived at the Split Rock Tavern?

A I'd say somewhere around quarter after 4.

JUDGE RYAN: Quarter after 4?

THE WITNESS: Quarter after 4.

BY MR. WARD:

Q And your best estimate as to when you would have left the Split Rock Tavern that evening?

A I remember somewhere around 6.

Q When you left the Split Rock Tavern did you feel that you were intoxicated?

A No.

Q On the prior occasions, this 4 or 5 times a week that you testified about it being your habit to have 4 or 5 drinks after work, would it be typical for you to feel intoxicated as a result of that amount of drinks?

A No.

Q When you left the tavern did you feel any differently than you might normally felt after a day of work and the numbers that you talked about, 4 to 5?

A No.

Q Where did you travel to after leaving the tavern?

A Okay. Drove down Split Rock Road, I remember-- Roads were fairly good, Bob. There were a few slippery spots and I normally drive about 35 miles per hour mainly because there were some icy spots and you always got the possibility of deer coming out.

But basically Split Rock Road to County Highway J to Seefeldt Road, from Seefeldt Road to the sales office.

Q So you drove directly from the Split Rock Tavern to the Tigerton mobile home; is that correct?

A That is correct.

Q And was it your intention to spend the evening at the Tigerton mobile home? Was that your intention?

A Well my intention was-- Believe it or not I started a diet that day, but I picked up a couple pizzas and I was going to cheat a little bit and I was going to

throw a pizza in, normally have a drink or 2 and work on sales.

Q So you had-- When you stopped at the grocery store although you indicated that you had started a diet, this diet was going to end fairly quickly and you were going to have pizza that evening.

A Yeah. Basically I had taken a couple of Dexatrim, I use those for diet.

Q Dexatrim is a?

A It's a diet pill.

Q It's an over-the-counter diet pill?

A Correct.

Q And you had taken some Dexatrim that day--

A I started the diet that day.

Q All right.

A If I remember right I took one in the morning and one around noon.

Q All right. I think my question for you was did you intend to spend the evening at the Tigerton mobile home.

Was that your intention?

A Yes.

Q Okay. And then when did you intend to make your call on Arrow Electric in Shawano?

A The following morning.

Q Your best recollection regarding leaving the Split Rock Tavern was around 6 o'clock, correct?

A Correct.

Q So it might have been shortly after 6 when you arrived at the Tigerton mobile home, correct?

A Well it's 3 and a half miles, so it would be approximately quarter after 6.

Q Did you find that your ability to operate your motor vehicle was impaired to any extent?

A No, I don't think it was impaired.

Q As of 6 or 6:15 on the evening of January 31, 1996, what was the weather like in Tigerton?

A My recollection it was about 25 below. My next door neighbor, Wally, had plowed the driveway out, but there was about 5 inches of snow on the sidewalk, stairs and the deck by the mobile home.

I didn't get out with a ruler and measure it, but I'd say 4 to 6 inches.

Q But it would be fair to say that there was snow on the ground and it was very cold even for Wisconsin.

A Yeah, it was cold, yeah.

Q When you pulled into your driveway which I assume had been plowed, correct?

A Yes, it was.

Q When you pulled into the driveway, what did you do

next?

A Basically got up, walked up to the stairs, I opened the storm door and I had to pull a couple of times because there was snow in front of it, and what I figured I'd do, you know, is get into the mobile home, throw a hat and some warmer clothes on , grab a shovel, you know it only takes about 10, 15 minutes to shovel that little bit of snow out there, clear it off, get the rest of the stuff from my car and go in.

Q I think what you've done is tell us what you had intended to do, and what I'm interested in more is what happened when you entered your mobile home.

A Yeah.

JUDGE RYAN: Go back to the point where I pulled on the storm door a couple of times.

MR. WARD: Right.

JUDGE RYAN: Pick it up from there.

MR. WARD: Sure.

BY MR. WARD:

Q You pulled on the storm door and you had some difficulty which you explained by indicating that there was some snow piled in front of the storm door. What did you do next?

A Well I tried the key in the mobile home and it didn't want to open.

One comment on the key--

Q Let me-- I'll ask you about the key.

A Okay.

Q Do you have an explanation as to why the key which you intended to use to open the mobile home was not working properly?

A Back in December of '95 I had lost the entire keys-- set of keys I had. They were lost when I was up bow hunting.

The keys that I had attempted to use were ones that I just had made. In fact I still got those keys today and I still have problems with them.

Q You had a replacement set of keys made off your wife's set back in Oak Creek; is that correct?

A I believe it was off the wife's set. It was a set in Oak Creek.

Q In any event it was a set of keys that had been freshly made and did not fit good.

A Correct.

Q And you were testifying about difficulty making that key work.

A Oh, I had difficulty. I couldn't get the door open and basically I tried-- Well I'm not sure of a time, Bob, because I felt very dizzy. I couldn't get in.

I put my shoulder to the door, I figured I was getting

dizzy, light headed, and I felt if I didn't sit down I was going to fall down.

Q So while you were carrying out the exercise and attempting to open the inside door, you indicated you began to feel dizzy?

A Correct.

Q All right. I think you indicated that you felt that the dizziness was such that you were concerned about whether you were going to fall down.

A That's correct.

Q So what did you do?

A Well I remember putting a shoulder to the door and I'm surprised because it's only a mobile home door, it should have opened up. It should have opened but it didn't.

There was a snow shovel there and I whacked that against the door. I still couldn't get it.

I was getting more dizzy. There was a rectangular plastic window there with a frame. Well basically the door is wood constructed, it has a little metal over it and it has a plastic window in it that's maybe 3 inches wide, 4 inches wide, about 14, 16 tall. Basically I broke out that plastic window. I reached in, opened the door from the inside, pushed the door open and I was kind of half in half out and that's the last thing

I remember.

Q That's the last thing that you remember having occurred on the evening of January 31, 1996; is that correct?

A Correct.

Q It's my understanding that the next thing that you remember is waking up the following morning; is that correct?

A That's correct.

Q And why don't you tell the Judge what you remember about the events of the morning of February 1, 1996.

A Okay. Woke up 8:45, 9 o'clock in the morning. Woke up and as I recall-- Well first of all, Bob, my hands hurt quite a bit. My feet hurt quite a bit, and I'm not positive what happened, but my best recollection is Ida Mae called on the phone.

Q When you woke up how were you positioned?

A I was laying right by the front door, the storm door was open, oh, maybe a foot, the inside door was open a foot, foot and a half, and I was laying right by the inside door.

Q So you were inside the trailer but the doors were ajar?

A Partially open, yes.

Q And I would imagine that it was cold.

A Well during the night I don't remember.

Q I understand, but when you woke up--

A I couldn't stop shaking.

Q So it was cold in the trailer, correct?

A Yes, it was, because normally what I do when I'm not there I turn the heat down to about 55, 60 degrees. When I broke into the mobile home I did not turn it back up so it was still set at 55 or 60, whatever it was. Low heat with the door open. Yeah, it was cold.

Q So what did you do when you woke up?

A Not positive, but I got up. I believe I sat at the counter and I believe Ida Mae called on the phone and then it was-- Pardon me. And then it was shortly after, I'm going to guess somewhere around quarter after 9, Wally and his wife Leona showed up at the door.

Q Now when you say Wally, the Judge doesn't know who Wally is.

A Seefeldt.

Q S-e-e-f-e-l-d-t, correct?

A Correct.

Q And Mr. Seefeldt is a neighbor who owns property adjacent to the property that you own?

A Correct. We had purchased that property from him and his wife.

Q Back when you bought it in 1990; is that correct?

A Yes, when we purchased it.

Q You indicated first your wife called and then shortly after Mr. Seefeldt and his wife arrived; is that correct?

A Correct.

Q At the time that Mr. Seefeldt arrived on the morning of February 1, 1996, what symptoms were you experiencing?

A Shaky, very cold, hands hurt very much, feet hurt very much. In fact I remember when they came over they put a pot of coffee on. I remember Wally was at the kitchen table and he was helping me drink coffee.

Q As of the morning of February 1, 1996, did you realize that you were seriously injured?

A No, in fact Ida Mae was trying to get me to go to the hospital and I said, no, it's not really that bad, and Wally and Leona were both trying to get me to go to the hospital and I said, no, it's not really that bad.

Q So you were initially resistant in the efforts to have you obtain medical care; is that correct?

A That's correct.

Q And ultimately you were taken by Mr. Seefeldt and another neighbor to the Shawano Medical Center?

A It was either Wally and Brian or Brian and Sharon.

Q Who? These are other names.

A They live 3 and a half miles away in Split Rock and I don't know if Wally called them or Leona called them

because they felt they would need some help because Leona had heart problems.

Q So you were taken to Shawano Medical Center?

A Shawano Emergency Room.

Q And I think your medical care is fairly well documented in the medical records and maybe I'll come back to that, but I want to focus on the trip.

You indicated it was your intention to call on an outfit called Arrow Electric in Shawano, Wisconsin; is that correct?

A That's correct.

Q What is the business of Arrow Electric?

A They're a foundry. Basically they produce their own castings.

Q If I understand correctly, Arrow Electric as of January 31, 1996 was not an existing customer for your business, Larsen Labs; is that correct?

A That's correct.

Q It was a previous customer; is that correct.

A Correct.

Q I'm going to show you what's been marked as Applicant's Exhibit H.

If I understand correctly these are invoice records from Larsen Labs reflecting the fact that beginning in October of 1987 and extending to August 1988, Arrow was

a regular customer of Larsen Laboratories; is that correct?

A That is correct.

Q After August of 1988 Larsen Laboratories never did any further business with Arrow Electric; is that correct?

A Not that I can remember, Bob.

Q However after August of 1988 did you make any efforts to re-secure Arrow Electric's business?

A Definitely. In fact Arrow Electric from the time we lost them as a customer until the time of the accident, I either phoned or personally visited Arrow Electric I would say every 6 months to a year.

The way it worked out, I never did get any business from them. I've had other customers who, you know, we had lost and then we'd gotten them back.

Q I'm showing you what's been marked as Applicant's Exhibit J which is a photocopy of a log that you provided to me; is that correct?

A That's correct.

Q And this entry that's highlighted on Applicant's Exhibit J reflects a contact with Arrow Electric that occurred about 1 year prior to January 31st of 1996; is that correct?

A Correct.

Q This contact occurred in January of 1995, correct?

A January 16, 1995, that was the initial contact. It was noted here I also called on January 26th, I called Dick Carst, I got his recording, and there's a note here I left a message with number up north, and the number I left for Dick Carst was the 715 number, the sales office up north.

Q So in January of 1995 you initiated a contact with Arrow Electric by telephone in an effort to re-secure their business; is that correct?

A Yes.

Q And what's outlined on Applicant's Exhibit J is a log entry that relates to your efforts in that regard as of January, 1995; is that correct?

A Correct.

Q I'm showing you what's been marked as Applicant's Exhibit G, which is a letter dated January 26th of 1995; is that correct?

A Correct.

Q And this letter is addressed to Rex Harrison who must have given up the stage and gone to work for Arrow Electric, in January of 1995; is that correct? This is a different Rex Harrison I assume. I'm sorry, this is just an aside.

A Yes, correct.

Q At that time Rex Harrison worked for Arrow Electric,

didn't he?

A Yeah.

Q And this letter pretty much confirms the activities that is documented on Applicant's Exhibit J regarding your prior telephone calls to a fellow named Dick Carst, and the letter outlines services that you were willing to provide to Arrow Electric; is that correct?

A That's correct.

Q Now did this effort yield any business from Arrow Electric?

A No, it did not.

Q Okay. Notwithstanding the fact that you were unsuccessful re-securing their business one year prior to January of 1996, it was your intention to then call on them as of January, 1996.

What were you thinking? What were you trying to do? You were trying to get their business but what was your thought process?

You said January of '96.

A I was trying to get their business. I was trying to get it on the phone. If I couldn't get it on the phone, then I would physically go out and see them.

Q So this was consistent with the practice that you've already testified about that initially you were trying to secure business over the telephone, and if that was

unsuccessful then you would try an in-person contact, correct?

A Correct.

Q Was it unusual for you to call on a potential customer without an appointment?

A No, it was not.

Q Was it unusual in the business generally as far as you knew-- Or when you did call on someone without an appointment were you generally successfully in getting somebody to talk to you giving you an opportunity to make a sales pitch?

A If I called on a company usually I either got to talk to somebody that had a potential for giving me the business, or I got a name that I could call back.

Q You indicated that throughout 1995 you were using that Tigerton address as a sales office and that's documented by your business card, correct?

A Correct.

Q I'm showing you what's been marked as Applicant's Exhibit I which is a copy of I believe a long distance telephone record from your phone number at the Tigerton address; is that correct?

A Yes, it is.

Q And on this Exhibit I are certain highlighted phone charges; is that correct?

A I see the highlighted phone charges.

Q Okay. And they appear to be long distance phone charges that are-- Do you know the purpose of the highlighting? What do these phone charges represent?

A Well I don't know the purpose of the highlighting but I can tell you basically by looking at the city they're in who they were made to.

Q Well I don't want you to go through them, there's probably a couple hundred, but--

A They are business calls, Bob.

Q Oh, okay. So the highlighted phone calls reflect business calls that were made from the Tigerton address; is that correct?

A That is correct.

Q And you also have phone numbers on there that was made from that sales up north down to the Milwaukee Lab, phone and/or fax calls.

A Right.

Q Do you know why it is that you ended up losing consciousness prior to making a full entry into the mobile home on the evening of January 31, 1996?

A No, I don't. I asked that same question to a number of doctors, and I've talked to so many doctors this past year, Bob. My best guess is it was a doctor in Appleton that told me it could be a lot of reasons.

Q Prior to January 31st of 1996, had you ever experienced any sort of dizzy spells of the kind which you experienced on the evening of January 31, 1996?

A Approximately 25 years ago I had went on a diet, crash diet, I had not eaten for, oh, I'm going to say probably 2, 3 days, and I was taking Dexatrim at that time. I basically got light headed and I got dizzy and I said, enough of that, and I went back to a reasonable diet. I didn't have that problem anymore.

One other time about that same era I was out to eat at a restaurant and I remember feeling dizzy, light headed--

JUDGE RYAN: When was this?

THE WITNESS: About 25 years ago.

JUDGE RYAN: Now that was the first time.

The second time--

THE WITNESS: Oh, this was-- this was, oh, probably within a few months of that. It was close to that time.

BY MR. WARD:

Q So also 25 years ago.

A Correct.

Q Okay. Go ahead.

A And I felt light headed, dizzy, and I happened to be with my boss from Latrobe Steel Company at that time,

George Stetson, and he loosened my tie up and sat me down and a few minutes later I felt fine, and I really never gave it much thought at the time.

Q Since January 31st of 1996, have you experienced any similar dizzy spells?

A When I was in the nursing home two times that I can recall I was in the whirlpool and it was very hot in the whirlpool, I get out of the whirlpool and same thing, very dizzy, light headed, if I didn't sit down I'd fall down.

That happened 2 times coming out of the whirlpool, and one time-- one other time at the nursing home I was in the smoking area and it was hotter than heck in there, at least it felt hot to me, there's older people in the nursing home, hotter than heck, I felt dizzy there.

There's been a few other times at home where I come out of a hot shower if I've taken a hot shower and I'm fine while in the shower, I get out of the hot shower, open the shower door, there's colder air, and I had the same thing, I felt dizzy, light headed, if I didn't sit down I'd fall down.

Q The medical record documents suggest that you're a fairly heavy smoker; is that correct?

A On and off.

Q Okay. Nobody likes to refer to themselves as a heavy

smoker or heavy drinker, but in regard to the smoking itself, how much do you smoke?

A Right now I don't smoke.

Q Well at--

A At that time--

Q Yeah.

A --I was smoking 2 and a half to 3 packs a day. I quit 3 times for a year and a half to 2 years each time.

Q But right now you're a non-smoker.

A Right, now I'm a non-smoker.

Q If I understand correctly it's your testimony that you've been unable to work since January 31, 1996, correct?

A Basically that's correct.

Q The records should reflect the fact that at some time after January 31, 1996, the frostbite that you had contracted on that date led to the necessity for your fingers and thumbs of both hands to be amputated; is that correct?

A That's correct.

Q And when did that amputation occur?

A I'm not positive, Bob. It was a bad time for me.

Q It would have been a couple months after they attempted to save them and they were unsuccessful; is that

correct?

A Probably 2 months. It would have been February-- I don't know for sure, Bob.

Q One of your hands today is bandaged; is that correct?

A Correct.

Q You have had kind of a healing difficulty relative to the left hand; is that correct?

A That is correct.

Q And you recently underwent surgery to assist in regards to the healing of that hand?

A Two to 3 weeks ago. Basically what he did--

Q When you say he, meaning who?

A Dr. Watchmaker, he's a hand specialist, he went in there as I understand it, he re-opened where the fingers were, cut the bones down quite a bit lower than they are now, and put it back-- the skin back over. The way he explained it to me the reason for this was with the bones closest to the surface, like the right hand bothers me constantly when I go to touch anything, he felt that the hand would have a chance of healing and it would provide-- by taking the bone and making it deeper down in the hand, it would provide a pad, give it a little cushion is what he called it.

Q When's your next visit with Dr. Watchmaker?

A This afternoon at 2:30.

Q You have a follow-up scheduled for today?

A Correct.

Q In the event the Judge should decide that this in fact a compensable injury, do you agree that your benefits will be subject to a 20 percent attorney's fee?

A Yes, I do.

Q Very good.

MR. WARD: That's all I have, Judge.

JUDGE RYAN: Cross?

Cross-Examination:

By Mr. Eichorst:

Q Mr. Larsen, I want to refer you to your Applicant's Exhibit F which is purported to be a business card. Does the address of the Tigerton trailer appear on the business card as a place of business?

A No, it does not, just the sales phone number.

Q The only address on the business card is your laboratory in Oak Creek, correct?

A Correct.

Q And it doesn't label or set off your trailer as a sales office and give it a separate address, does it?

A It sets it off as a sales office, it does not give a separate address. Basically the reason Larsen Laboratories is on the business card, if you were a customer and you were sending samples you would send it

to the 250 Oak Street address, you wouldn't send it to the sales address.

Q True. But my question, sir, is is that the card does not set off the fact that you have a sales office in Tigerton, Wisconsin, does it?

A It does not give an address for the sales office.

Q Okay. It's my understanding from reviewing Exhibit H which purports to be business records with respect to sales you did with Arrow in 1988 and 1987, it looks like you did sales totaling $2,441. Along the line of your customers, is that a lot of business, or a very small part of it?

A You mentioned $2,000--

Q $441.

A Now was that in a given month?

Q No, that's for the total of July-- Excuse me, the total of 1988 and 1987 combined.

A To me that number sounds low, but we have customers that go as low as $25 a month on up to several thousand dollars a month.

Q You didn't do a lot of business with Arrow Electric, did you?

A I thought it was a good account.

Q And that account ended sometime in 1988?

A Whenever it shows on the last receipt.

Q Do you know why your business with them ceased?

A As I recall I called Arrow Electric afterwards and I asked them, I says, is there a problem with the type of work we're doing? And they said no.

Q Who did you talk to?

A At that time?

Q Yes.

A You're talking 9 years ago, no, I don't know who I talked with.

JUDGE RYAN: Let's back up and get the first questioned answered.

Do you know why you lost that account I think it is.

MR. EICHORST: Right.

JUDGE RYAN: Do you know?

THE WITNESS: Not for sure.

BY MR. EICHORST:

Q And you don't recall who you talked to?

A Well the name that sticks in my memory over the years is Dick Carst.

Now I only know the gentleman-- In fact I'm not positive I met him, I think I met him at Arrow, but I've talked to him hundreds of times on the telephone.

Q Dick Carst?

A Dick Carst. Most of the time when I called Arrow Electric I'd get Dick Carst's answering machine.

Over the years I've talked to a number of people at Arrow Electric.

Q Do you have any idea what their names are?

A Well you got Rex Harrison, that's the letter--

Q Do you know what Rex's position at Arrow Electric is?

A I don't even know if Rex Harrison is still at Arrow Electric.

When I had written that letter he was the person that I was told by Dick Carst that he was the person to talk to get the test bar and/or chemistry business.

You know, what his title was at that time, I don't know.

Q Who else did you talk to if you recall through the years?

A Gordy Ubanstein.

Q What's Gordy's job description?

A You're going back too far, I do not know. But if I talked to them, he had to have some factor in deciding where there test bars were sent to, whether they were sent to our lab or one of our competitors.

Q Do you know that Arrow Electric has been known as Arrow Cast, Incorporated for some time?

A I don't know when they changed. Prior-- Prior to-- They just had it changed recently, I remember seeing that. Prior to that they were called Arrow Electric

Iron Casting.

Q What are they known now as, do you know?

A I'm not positive. I haven't had any contact with Arrow since the accident.

Q You haven't talked to them since the accident?

A No, I have not.

Q In fact, you didn't have any contact with them since January of 1995, did you?

A Yes, I did.

Q And when was that?

A I called many times from the trailer up north at the sales office.

Q Okay. So the only documentation to support that would be the phone records.

A Phone records would support that. In fact Shawano in the position of that sales office, you get a different long distance phone Bill from them, and prior to this hearing I attempted to get a copy of those phone records from the sales office that would show that I had called Arrow Electric in 1995.

Q Did you try to bring the people from Arrow Electric down for your hearing today?

A No, I saw no reason to.

Q You didn't see any reason to have them corroborate anything you're telling us today?

MR. WARD: This would be argumentative and irrelevant.

JUDGE WARD: Pardon me?

MR. WARD: This would be argumentative and irrelevant whether Mr. Larsen plans to bring witnesses or not bring witnesses.

JUDGE RYAN: Overruled.

BY MR. EICHORST:

Q Go ahead and answer.

A No, I didn't deem it necessary.

Q In fact the only documentation you provided to us today with respect to contact with Arrow Electric is a letter of January 26, 1995 to Rex Harrison, and a note around the same time.

Do you keep notes every time you call on somebody?

A If there's pertinent telephone information, normally I record it.

Q What's so pertinent about Exhibit J that you provided with us today?

Why does this phone call make it important for you to document what was said aside from any other time?

A Well I think number one Rex Harrison was the quality assurance manager. I think it's important to note that.

Q But you knew that, right?

A Pardon?

Q Didn't you know that?

MR. WARD: Well, Judge, he's asked him a question and now he's intending to argue with him about his answer.

MR. EICHORST: I'm not--

JUDGE RYAN: Just a minute. Everyone, just a minute.

I get a request for a ruling and then there's discussion from almost everybody in the room. Thank you very much everyone in the back for not coming up and discussing it here.

My ruling is that I'm going to sustain your objection. Let him finish his answer before you begin your next question.

MR. EICHORST: I apologize, Judge.

JUDGE RYAN: And I want everyone if and when they testify to avoid talking when someone else is talking, especially me.

THE WITNESS: You asked me--

BY MR. EICHORST:

Q I think you indicated to me that Rex Harrison was the Q.A. manager, correct? And you thought that was important.

A Well my notes tell me that I talked with Dick Carst,

Dick Carst had told me that Rex Harrison was the quality assurance manager. Per Dick I sent a letter to Rex who also told me in order to do business again with Arrow Electric we were going to have to be CAT certified, with is Caterpillar certified.

Q Are you Caterpillar certified as of today?

A No, we're not. There would not be a reason for us to be CAT certified unless we get business from a customer that requires us to be CAT certified.

Q Okay. Is this January 26, 1995 letter known as Exhibit G the letter that you sent then to Rex Harrison?

A Oh, I'm sure it is.

Q Is that your signature at the bottom of the page?

A No, it is not.

Q Whose is that?

A That's Ida Mae Larsen's.

Q Does she normally sign your letters?

A Normally it's a combination. Normally I sign them, other times when she's done typing them and she double checks the typing to make sure it's correct, yes, she does sign them. She has my approval to do that.

Q Other than what we have here today, is there anymore documentation with respect to your involvement with Arrow Electric from late say mid-1995 to today?

A Not that I'm aware of, no.

Q In fact there is none, right?

A Oh, I think there is documentation. I think there's documentation from the phone records from Shawano, Wisconsin.

Because I-- In 1995 I wouldn't bet my life on it, but I'm almost positive that I phoned Arrow Electric Company from the sales office up north.

Q While you were already up there, right?

A While I was up there in 1995. I spent considerable time at that sales office.

Q Not only for business purposes but for recreational purposes also, correct?

A Correct.

Q Okay. So there might be an occasion when you were up there on recreational purposes when you'd call Arrow on the phone, right?

A Not that I ever remember doing.

Q Wasn't that what you just said, that you were up there one time and you called them by telephone while you were at the Tigerton address?

A When I called from the Tigerton address is when I was working on sales at the sales office.

Q Oh, okay. So what you're telling us is you can separate when you're up there on business and when you're up there for recreation. Is that what you're

telling us?

A Well, I'd say yes, I'm telling you that.

Q That's it. That's all I need to know.

You said you purchased this-- Did you purchase land up there first and did you then put a trailer on it? How did that all come about?

A Purchased the land first.

Q You purchased that from Mr. Seefeldt who is here today?

A That is correct.

Q Okay. When did you purchase the land?

A The land was purchased November or December. It's been 6 years-- about 6 years now. A little over 6 years ago I purchased the land.

That was in November, December--

JUDGE RYAN: What year?

THE WITNESS: I got to go back, '97 - '91. About 6 years.

BY MR. EICHORST:

Q And then you placed a mobile home on it soon thereafter?

A The following Spring.

Q Did you purchase that mobile home up there or did you haul it up?

A That was purchased as I recall in Green Bay.

Q And it's my understanding that you initially purchased

the land in Tigerton and the mobile home purely for recreational purposes.

A That is correct.

Q And at sometime thereafter it changed into a quasi-recreational home/business office.

A Well in the Fall of 1993.

Q What's significant about that day-- or that date?

A Well it's significant because that is the time that we set up the sales office in that mobile home and started using it as a sales office.

Q At the time you set up the sales office did you happen to place business insurance on the trailer as a sales office?

A Okay. When we first--

Q Yes or no?

A Could you ask that question one more time?

Q When you set up your sales office as part of the mobile home, did you place business insurance on that sales office with respect to your laboratory operation in Oak Creek.

A Not that I'm aware of, because there wasn't-- Did you want me to continue with an explanation?

Q That's fine. I have your answer and that's no, correct?

You've never had business insurance on that property

for Larsen Laboratories, have you?

A Not that I'm aware of.

Q Okay. The automobile that you were driving on the day of the incident, January 31, 1996, was that a personal automobile or was that a company automobile?

A That is a company automobile. It is titled in the name of Ida Mae Larsen and William E. Larsen. It is used as a company vehicle--

Q It's not insured as a company vehicle though, is it, sir?

A I don't know, because I do not handle the insurance on any of the automobiles.

Q It wouldn't surprise you to find out that it's not insured as a business automobile.

MR. WARD: Objection, relevancy. Whether or not he would be surprised is irrelevant.

JUDGE RYAN: Overruled.

THE WITNESS: I don't really know.

BY MR. EICHORST:

Q Who would know?

A Ida Mae handles the insurance for the lab and automobiles.

Q She handles the insurance for the lab and automobiles and she would know if through your business at the Oak Creek address, Larsen Laboratories, if you had named

the trailer as an additional insured on the business policy or the automobile which you were driving on that day as an additional automobile on the business policy, she would know that.

A Well I think we should ask her because I do not know.

Q You don't know.

A I do know that the initial insurance on the mobile home up north, initially that started out strictly for recreation. Basically the insurance company provided us coverage on it and it was one of those things, you get a premium once a year, you pay it and really just never gave it much thought.

Q Isn't it true that the mobile home up north was simply a convenience for you to travel up there and get away from it all and also do some business?

A A convenience?

Q It was more of a convenience for you then a sales office, was it not?

A No, no, that's not true.

Actually it worked out-- I did better on sales up north then I did at the 250 East Oak Street address.

Q Why is that?

A The reason for that, at the laboratory there were constant interruptions, there was a noise factor with the lathes running factor, tensile tester running

factor, I could concentrate on the phone a heck of a lot better up north and I'd do a better job on sales then I did down in Oak Creek.

Q By the same token you could concentrate a lot better at your home in Cudahy making your business calls.

A Oh, I made a few phone calls on business from the house in Cudahy, too.

Q So the home in Cudahy is the same situation as the home in Tigerton--

A No, it's not.

Q --for convenience?

A No, it is not.

The sales office in Tigerton was used as a sales office for Larsen Laboratories.

The home in Cudahy outside of a couple business calls that I did make was basically used for a home.

It wasn't a sales office.

Q So what you're telling us is you traveled 3 hours or more a few times a month to use that trailer as a sales office.

A Well actually if you go back to the phone records--

Q We'll get back to the phone records.

A Okay. In the Fall of 1993 we pretty much worked out of that sales office for the Fall of 1993 and it's my recollection in 1994, a good portion of the time we

were physically at the trailer working on sales out of that office.

Q You don't have phone records dating back that far. You haven't produced those, all I have is the 1995 records.

MR. WARD: Is that a question?

BY MR. EICHORST:

Q Is that correct? You haven't produced 1993 and 1994 phone records today, have you?

A I don't know. There should be records for that sales office from the Fall of 1993.

Whether they're introduced, I don't know.

Q Your job duties didn't force you to work up in Tigerton, did they? Outside of the noise you could have done the same amount of work at the Oak Creek office, correct?

A I feel I accomplished more at the sales office up north as far as being on the phone with customers and potential customers than I did at the Oak Creek office.

Q Do you have an answering machine at the trailer in Tigerton?

A Yes, I do.

Q Has the message on that machine changed at all since 1995?

A Yes, it has.

Q When did it change?

A The message that used to be on it before my accident it stated very clearly on there, you have reached, and it was made by Ida Mae Larsen, I remember something to the effect that you have reached Larsen Laboratories and Ida Mae and Bill Larsen, to leave a fax, do it now; to leave a recording, do it now.

It was a combination business message, personal message.

Q Personal message because it was a combination personal second residence slash business office, correct?

A Well, you could say sales office slash-- Put it either way you want. It was used as a sales office.

Q It was also used as a personal residence, correct?

A A personal residence or--

Q Personal second residence. It was a recreational cottage or mobile home; isn't that correct?

A As well as a sales office, yes.

But you asked about the recorder before and after. Since the accident I changed that recording, it does not reflect the business. It's a personal message on there right now.

Prior to my accident it was a business message that was put on that recorder.

Exactly what it said, I don't know. But I do know it was a business message.

Q When did the message change?

A Well after the accident I hadn't been up there for quite a while, so I would say, it's been a little over a year since the accident, sometime within the last 6 months.

Q And did that message appear on your answering machine in the Fall of 1993 up to the time of the accident?

A There was-- The Fall of whenever it was, 1993, through the accident on that recorder there was a business message for people who called referring to Larsen Laboratories, Inc., and during that time there were people that called me at that sales office. Customers had called me at that sales office. And potential customers.

Or am I answering questions that you didn't ask? I'm sorry.

Q That's fine.

How would these customers know that you were up there?

A Well I say a combination of ways. Probably mainly because I told them I was up there.

I told them, you know, where they could reach me.

Another thing is quite a few of the business cards were given out. They could have called me because of the sales number on the business card.

But if I was guessing I would say mainly because I had

told them that that's where I was.

THE WITNESS: Sir, I hate to ask, I've been having some kidney problems--

JUDGE RYAN: Yeah, sure. Recess.

(Recess taken.)

JUDGE RYAN: Back on the record.

BY MR. EICHORST:

Q Mr. Larsen, you previously testified that you normally followed up with Arrow every 6 months or so; is that correct?

A For a customer that we did work with, again it depends on how the conversation goes, but normally if it's a customer that I feel I've got a potential to do business with, and I felt Arrow Electric I had potential, with Arrow Electric I would put them in the category of seeing them or talking to them every 6 to 12 months.

Q Did you follow up with them in June or July of 1995 after you talked to them in January of 1995?

A Yes, I did, but I don't have the phone records which you have been asking for. Yes, I did follow-up.

Q Okay.

A I do not have a record of it but I did follow up.

Q What transpired during that phone conversation?

A I can't tell you specifically because I do not have a

record of it.

Q Is it safe to say you didn't get any of their business, correct?

A I did not get their business.

Q And you do not believe that's because you weren't CAT certified as suggested in 1995, or at least the telephone conversation--

A Well I wouldn't suggest-- No, I do not believe it's because we're not CAT certified.

Q Fair enough.

It's true you didn't have a scheduled appointment on the 1st of February, correct?

A Correct.

Q You didn't have a scheduled appointment on the 2nd of February either, did you?

A Correct.

Q Okay. It was a cold call.

A Correct.

Q Okay. Had you ever in the past called on Arrow Electric when you were simply up there on recreation and decided to pop in on them?

A I called up-- I called up-- Again this is only an approximate time, it was-- Let me see, when the heck was it? 1996-- I would say in 1994 I had made a phone call when I was up there.

Q My question was, was there an occasion when you were up there for recreational purposes or just up north at the trailer when you decided to just pop in on Arrow Electric for convenience?

Yes or no?

A I made a call on Arrow Electric from the sales office, I physically went over to Arrow Electric. To ask whether I was using it for recreation at the time--

Q You were, weren't you.

A I would say if I called on Arrow Electric I was using it for the sales end of it, but I have used it for recreation. I've used it for both, sales, business and recreation.

Q In fact when you were simply up there completely for recreational purposes, you'd stop in on Arrow every now and then just because you were up there, correct?

A No, that's not correct.

Q Isn't it-- I think you suggested that in some of the documents I see that Ida Mae sat in the car one time when you visited Arrow Electric; is that true?

A On one visit, yes, I had left Ida Mae in the car. She waited in the car while I went in and I talked to Arrow Electric.

That was the last time I was at Arrow Electric.

Q And you two were up there for recreational purposes,

correct?

A That was possible, but--

Q It's true, isn't it?

A Well, you know, at that time we were using it for sales, so I would say it was-- if I called on Arrow Electric the day I called, I'd say it was for sales. But, yeah, at that time I could have used it for recreation as well.

But usually when I used it for recreation, it was recreation. If I used it for sales--

Q And as a matter of convenience of just being up north it's easy for you to pop in and see Arrow because their in Shawano, right? Tigerton is only 2 miles away.

A Well it's easier to call on Arrow Electric from the sales office up north than it is to call on them from the Oak Creek address, yes.

Q It's more convenient, isn't it?

A To call on them from the sales office up north? Yes, it is.

Q Especially if you're up there for recreational purposes you might as well stop in for business purposes.

A My recollection is the few times that I called on Arrow Electric when we had the sales office up north, during those times I was conducting sales business for Larsen Laboratories.

Q Now the day you left Larsen Laboratories on January 31, 1996, it was pretty darn cold in Milwaukee, wasn't it?

A As I recall I'd say about 20, 25 below zero.

Q It was cold, wasn't it?

A Oh, yes, it was cold.

Q And you were traveling up north to call on Arrow Electric exclusively.

A The main reason was to call on Arrow Electric. The other thing that I had planned on doing is while I was up there-- The main reason for the trip was to call on Arrow Electric, but I was also going to work on sales work, just calling other customers and/or reviewing print-outs from the laboratory from the Oak Creek lab.

Q You were also going to take it easy and relax, right?

A No, I was going to work on sales.

Q The whole time?

A Well as much of it as I could, and I would relax. I mean, when you work, you know, you have to have some time for relaxation.

Q When you left on Wednesday when did you plan on coming home?

A That was open-ended. Ida Mae and I had discussed my going into Arrow Electric on Thursday morning. If I got in on Thursday morning and I seen the people, I made that sales call, come back from Arrow Electric on

Thursday, review the print-- computer print-outs from the lab, faxed them back, whatever information was necessary, if I would have done that, I would have probably driven back Friday morning.

Q So you weren't going to stay the weekend?

A I hadn't planned on it. I had planned on staying Friday if I could not get into see Arrow Electric on Thursday. Because if on Thursday I couldn't see the right person I was going to go back Friday.

Q It seems like a lot of trouble. Why didn't you just call up there and make an appointment? Especially when you knew it was one of the coldest days of the year.

A Well evidently the cold bothers you more than it bothers me.

Just prior to the accident-- You know, I was gone-- I hunt all day in 20, 25 below weather. It's not a factor, or it wasn't at that time. It is a factor now. Right now the cold is very much a factor, but at that time it wasn't. It didn't bother me then.

Q So you'd go up to your mobile home any time of the season, Winter, Summer, Fall--

A Oh, I've been up there any given month.

Q Isn't it true, Mr. Larsen, that on January 31st of 1996, you were solely traveling up north to check on your trailer?

A It is not.

Q That's not true?

A No, sir, it is not.

Q Do you recall telling medical personnel that that's the reason why you were up there?

A I did not tell the medical personnel that is the reason I was up there.

Q As a result of your accident you were taken to Shawano, the E.R. Room, right?

A That is correct.

Q Okay. And what you're telling us is you don't recall telling anybody anything up there, is that what you're telling us?

A No, that's not what I'm telling you.

Q Okay.

A I'm telling you that I did not tell anyone at Shawano Emergency Room that I had gone up there because of work I had planned to do on the mobile home.

I did not do it.

Q So under the nursing assessment of the Shawano Emergency Department record which states, came up from Milwaukee to check on summer mobile home, that wasn't true?

A That information did not come from me.

Q Well who did it come from?

A Well I talked to Karen Johnson--

Q Who's Karen Johnson?

A She's the R.N. that's got her initials up in that Emergency Room, and I asked her the question, why is it on there, I did not make that statement, could you give me a little more explanation on it, and she says that-- I had asked her to write me a letter, you know, on what transpired, who made that statement?

And what she did do, she put an addendum in my records on more information on that question you're asking, which I have a copy over on the table.

And in that it states very clearly that that information came from my neighbors.

Q And those being?

A Well my neighbors were Wally Seefeldt, his wife Leona Seefeldt-- Now Leona had passed away after my accident, she passed away May 29th--

Q That's fine.

So what you're telling us is your neighbors knew why you were up there.

A No, I'm not telling you that.

Q Okay. Well you told us that, correct me if I'm wrong, did you say that the neighbors told her that's why you were up there and that's why she memorialized it that way?

A Her statement was-- Okay, when I saw that statement, going up to check on my summer mobile home, I called Karen and I said, you know, do you remember where this statement come from?

Q We've been over that. I'll restate my question. Did she get that statement from your neighbors?

A That's where she told me she got it. I don't know for sure where she got it.

Q Did you tell your neighbors that?

A No, I did not. There would be no reason to.

Q In the medical records to Appleton where you were transported to next, it makes a statement-- or at least there's some statements made in the record that you went to the mobile home to turn on the heat. And in the St. Luke's records it says basically the same thing, fainted while trying to open door of trailer to turn up the heat.

A Well very definitely. My intention was to turn up the heat once I got into the mobile home. It was very cold in there. To turn up the heat so I could warm it up to about 70 degrees.

Q In fact the reason why you went up north to turn up the heat is because you didn't want the water pipes to break; isn't that true?

A That is not.

Q Did the water pipes break?

A No, they did not.

Q So another statement in the Appleton Medical Center notes, United Health Group, which indicates that the pipes were frozen inside the trailer--

A Oh, that is correct.

Q Isn't that what I just asked you?

A No, you asked me if the pipes had broke and they did not break.

Q They froze.

A The pipes in the kitchen sink, and I can't remember if it was in-- I think it was the cold water, they had froze up. I mean the door was open all night. It was darn cold.

After the door closed those pipes thawed out by themselves.

In fact they thawed out before I left for Shawano Emergency Room.

Q Also have a note from a psychiatric consult, a Dr. Lorton dated 3/15/96, which states, patient went up north for the weekend alone, as he's an avid deer hunter and an outdoor type person.

Where did he get that information?

A Well I've got some notes on that. Can I get my notes and I'll answer your question?

Q Why don't you just answer my question without the notes.

A Number one, deer hunting is not open at that time of year.

I did not tell him that the reason I was going up there was to go deer hunting for the weekend. It was an incorrect statement.

Q But you did tell him you were going up there to get away and do outdoor stuff.

A I had told him that I do hunting, deer hunting up there.

I did not tell him what I was doing on January 31st.

Q In fact I reviewed all of your medical records up to date and I've yet to find any information where you've told anyone the reason why you were up there was because you were going up there to work.

A Your--

Q Why is that?

A Is that the medical?

Q Yeah. Why is that? Why-- What you're saying is that you're saying that I didn't tell them that I was going up there to check on the trailer, true?

A That is true, I did not tell them that.

Q Okay. But that appears in the records, correct? I'm assuming you've reviewed all of the records.

A I've looked at them, yes, I have.

Q You've done more than looked at them.

A I disagree with quite a few of them, sure.

There were quite a few errors.

Q By a number of medical facilities, continued errors.

A Well if you'd like to talk specifics, you asked the question about Dr. Lorton, if you want let me get my notes and we'll talk specifics. If it's okay with you.

Q No, it's not okay.

A Oh.

Q I'm not going there right now.

A Okay.

Q I think we can all agree with what Dr. Lorton has put down in his notes.

MR. WARD: He should ask a question rather than making a comment.

JUDGE RYAN: I agree. Ask a question rather than making a comment.

BY MR. EICHORST:

Q Again, isn't it true, Mr. Larsen, that you were going to travel to your trailer that week irrespective of calling on Arrow Electric? Isn't that true?

A The reason I made that trip was for Larsen Laboratories it was a sales call, my intention was to call on Arrow Electric.

Q Did you call on any other businesses in that area while you were up there any other time other than Arrow Electric?

A With one exception, no. I haven't.

Q What's that exception.

A There was a guy from a machine shop up there that I had talked with concerning running chemistries for him. To make a long story short, it was very low volume, you know, one, two, you're done. Very low volume. I had quoted him a price of if I remember right of $25. He never needed the chemistry, but that's the only local one in that area, I remember that.

Q Shawano, Tigerton, the northern area, the only business that you called on more than once was Arrow Electric; isn't that true?

A The only one in the Shawano area that I'm aware of that would be a good business potential for us is Arrow Electric.

I know of no one else in the Shawano area-- immediate area.

Q Isn't it true the only time you check on business opportunities at Arrow Electric when you were up there was when you were up there on recreational purposes?

A No, that's not true.

Q Previously in your testimony you talked about making

calls, other than phone calls, personal visits with Essex is it?

A I had personally called on Essex.

Q A Mr. Cunningham?

A Yes, Mr. Cunningham.

Q An organization in Indiana which the name escapes me.

A I believe that's Golden Casting.

Q Okay. There's three. Any others you've made personal visits to?

A The Manchester Foundry.

Q Four.

Most of your business is done over the phone; isn't that true?

A Oh, yes, it is. Whenever possible I do it on the phone because I could cover more ground on the phone.

Q You made very few personal calls on businesses; isn't that true?

A That is correct.

Q Are there any others that are escaping you right now that you have called on other than at Arrow and the 4 that we talked about in the last 5 years?

A I'm sure there are-- In the last 5 years?

Q How about the last 3?

A Well, you want me to-- Vilter Manufacturing, Chuck Faro, I've been over there a number of times.

Q Do you have documentation for these visits?

A No, you're going back 3 years. Normally-- Normally what I do is with documentation-- I have some documentation for it. Not with me.

But normally when I make visits I usually used to carry a yearly log in my suit jacket, make notes in, but basically, you know, unless there was a reason to keep them, the end of the year I'd throw it out.

Q You had no business obligations up north on the 31st of January, 1996, did you?

A No business?

Q No business call that day when you were traveling that day. Scheduled.

A No, I had no scheduled calls.

Q And I believe the only person-- I take that back. It was Ida Mae you told you were going to the trailer, right?

A That's correct.

Q Did you tell your-- Are they your stepsons?

A My stepsons.

Q Okay. Did you tell them you were going up there?

A Yes, I did.

Q Okay.

A I told both Rick and Kelly Salvos that I would be up there and to fax the print-outs--

Q Did you tell them you were going up there to visit Arrow Electric, or did you tell them you were going up there to get away from it all for recreation?

A Well I did not tell them I was going to visit Arrow Electric.

I did not tell them I was going up there for recreation.

What I did tell them was plain and simple, I was going up there and to fax the computer print-outs when they were done to me so I could review them and I would fax them back, but I normally tell them--

Q It's true that you didn't tell them you were going up there to visit Arrow Electric. That's what you just said.

A Oh, yes, that is true.

Q So the only person that can substantiate that you were going up there to visit Arrow Electric that week is Ida.

A No.

Q Well who else?

A Wally Seefeldt.

Q Okay. Wally's going to tell us that too, right?

A He certainly is.

Q Okay. How did Wally know that?

A Well when I asked--

Q Because you told him, right?

A For Wally, yes.

Q And when did you tell Wally that the reason why you were up there was because you were calling on Arrow Electric?

A Pardon?

Q When did you tell Wally that the reason why you were up there was because you were calling on Arrow Electric? When did you tell him that?

A Number one, I do not recall telling him that at all.

Q Okay.

A When I-- Oh, a couple of weeks ago I talked to Wally and I was going to ask him if he would consider testifying to the fact that he does a lot of, you know, the plowing and maintenance for me up there, and for other reasons, and at that time I said to Wally, I says, hey, there isn't a chance that I mentioned to you that I was going to Arrow Electric, and he says, yes, you did. He says, you told me that the morning of the accident.

Q Fair enough. Did you bring any-- Strike that. Do you keep, and I think you've alluded to this before, when you travel and you're calling on customers face-to-face, do you keep any travel log of your expenses, that part of your business to bill Larsen

Laboratories? Your mileage, your gas, your food, do you keep a log of that?

A When I'm traveling, yes. And Larsen Lab does reimburse me for it, for expenses.

Q Did you bring any of that documentation today?

A No, I did not.

Q Is the reason that your trailer or mobile home turned into a sales office in 1993 have anything to do with your marital situation?

A Yes, she's the one that suggested it, and I agreed.

Q Did she throw you out of the house?

A Oh, she's thrown me out of the house many times.

Q How many?

A Well, you know, in over what time frame?

Q Let's say in the last-- Let's say since 1992 to the date of the accident, how many times had she thrown you out of the house?

A Actually I don't think she's thrown me out of the house.

Q Well how many times have you had to leave the house--

A Have I had disagreements with her? Many times.

Q More than 10?

A Since 19--

Q '93.

A Oh, I would say-- I would say more than that.

Q In fact you were separated for about 2 years in that stretch, weren't you? And she was going to file for divorce.

A Well--

MR. WARD: That's a multiple question.

BY MR. EICHORST:

Q Start with the first.

JUDGE RYAN: Okay, okay, okay.

MR. WARD: His question was, you were separated for 2 years during that stretch, that stretch pursuant to his earlier question was from 1993 until the date of the accident, so if I understand the question, were you separated for 2 years between 1993 and January 31, 1996.

That's the question, right?

MR. EICHORST: That's true, and I apologize.

MR. WARD: That's all right.

Not 2 years solid.

THE WITNESS: On and off, yes.

Just one comment. Lot of love for the lady. Yes, we do, we fight a lot, but there's a lot of love there.

BY MR. EICHORST:

Q And when you do fight, your refuge is to go to the trailer up in Tigerton; isn't that true?

A Yes and no. Sometimes yes, sometimes it's a motel

local.

Q Most of the time you go up to Tigerton.

A I'd say most--

Q I am right--

MR. WARD: Let him answer the question.

MR. EICHORST: He said most, the answer is most.

JUDGE RYAN: The voices were too superimposed for me to figure out what the question was and what the answer was, so maybe the Court Reporter--.

MR. EICHORST: I'll ask it again, Judge, if that's easier.

JUDGE RYAN: That sounds great.

MR. EICHORST: Fair enough?

MR. WARD: Fine.

BY MR. EICHORST:

Q Is it fair to say that most of the time that you didn't get along with your wife that you left your address in Cudahy and you went up to Tigerton.

A I'd say no, I'd say about 50-50.

Q 50-50.

Where would you stay when you wouldn't stay at your mobile home?

A Motel.

Q Do you have receipts for that type of thing?

A No, I don't. It's not a business expense.

Q Kind of an expensive proposition; isn't it?

A Oh, you bet.

Q Getting back to the point, it was convenient for you to have the sales office up at the mobile home in Tigerton around the fall of 1993 because you and your wife were separated and having difficulties, correct?

A No, that's not correct.

Q What's not correct about that statement?

A Well you said we were-- basically we established that business office in 1993 because we were having difficulties, that's not true, we were actually getting along super good when we decided, hey, jointly, that we were going to make that into a sales office for Larsen Labs.

Q So you deny that as being one of the reasons why you were going up to do most of your work, or a large part of your phone call work.

A Boy, I really don't know how to answer that. It's true, you know, I spent time up there because of disagreements Ida Mae and I had, but the main reason when I was up there on sales work was for business for Larsen Laboratories.

Q Did you and Ida Mae have a disagreement or a fight on January 31st?

A No, we did not.

Q Day before?

A No, we did not.

Q The week before?

A No, we did not.

Q All right.

A Not that I can recall.

Q When was the last time up to the date of your accident you had to leave the house for marital reasons?

A I don't honestly know. I know that I was at the home the entire month of January. January 2nd-- 1st or 2nd I came back from up north because the end of December I had spent 5 days at the mobile home using it for recreational deer hunting. I was bow and arrow hunting for 5 days.

The last 5 days in December.

Q From looking at your 1995 phone records, it looks as though you spent a little over a month up in Tigerton from September 10th to around October 18th of 1995. That's quite a long stretch. What was the reason for that?

A From which days?

Q September, 1995 and October.

A I'm not sure.

Q Okay.

A If you let me look at the phone records I might be able to answer that. It's kind of hard without them.

Q Were you thrown out of the house again?

A Not that I recall.

JUDGE RYAN: Initially you asked-- You gave him September 10th to October something.

MR. EICHORST: 18th.

JUDGE RYAN: The next time you asked the question I think you went just September to October, what was the date in October that you asked?

MR. EICHORST: The record will reflect, at least the phone records, Judge, that it is going to be a stretch from September 10, 1995 to October 18, 1995.

JUDGE RYAN: October 8th?

MR. EICHORST: 18th.

JUDGE RYAN: 18th. Is that what you asked the first time?

MR. EICHORST: That's what I asked the first time and I tried to make it easier the second time by saying September to October.

JUDGE RYAN: Well maybe you didn't make it easier. Maybe it would have been easier if you would have told him the dates.

MR. EICHORST: Well I think he knows the dates so we'll just move on.

BY MR. EICHORST:

Q So you testified that you left the Larsen Laboratories at about I think you said 12:30 or thereabouts.

A Correct.

Q On January 31st.

A Correct.

Q Could it have been between 12:30 and 1:30? Do you know exactly when it was?

A Well I would have to go with 12:30. You know, I'm not positive on 12:30, but I remember hitting Tigerton about 3:30. I remember leaving about 12:30. I know from the many times I've driven there it's about a 3 hour drive, so, you know, leaving at 12:30 from what I remember, getting there around 3:30, you know, but it could have been quarter after 12, quarter to 1, I'm not positive.

Q Okay. And when you got up there you stopped to buy some groceries?

A Correct.

Q What did you buy?

A I bought a 12-pack of Diet Coke, I bought a bottle of Kessler Whiskey-- Diet Coke, 12-pack, I bought a bottle of Kessler Whiskey, I bought 2 packs of Pall Mall Cigarettes, I bought 2 Tombstone medium sized pizzas and I think they were cheese and sausage deluxe.

JUDGE RYAN: And the last?

THE WITNESS: Oh, I said I think they were cheese and sausage deluxe. And I may have purchased something else, but you're going back over a year, that's what I remember buying.

MR. EICHORST: That's pretty good.

THE WITNESS: I remember thinking, geez, you're just starting a diet and you're going on pizza.

BY MR. EICHORST:

Q You started your diet that day, right?

A That is correct.

Q And how many Dexatrim tablets did you take that day?

A I-- To my recollection I took one in the morning, one at noon and I may have taken another, but I only remember the 2.

Q And you hadn't taken any the day before?

A To my knowledge, no.

Q The week before?

A No.

Q Did you take any-- Have you taken any since the accident?

A Actually, no, no, I haven't. I should, but I haven't.

Q So one of the items that you purchased was a bottle of Kessler's Whiskey, right?

A Yes, that's correct?

Q Did you intend on drinking that while you were up there?

A Well I intended when I got to the mobile home to have a drink or two while I worked on sales paperwork. Whether I was going to drink that particular bottle I don't know, because I don't know, you know, if I had any whiskey there or not.

Q You might have had another bottle at the mobile home, right?

A That was possible. Obviously I didn't think so or I wouldn't have bought one, so--

Q Then you went to the feed store and bought some shelled corn, right?

A Correct.

Q Okay. And about 3 pounds I think you--

A No, sir.

Q How much did you buy?

A 300 pounds.

Q 300 pounds?

A Correct.

Q Did you put that in the trunk?

A Yes, I did-- Actually I didn't, they put it in for me.

JUDGE RYAN: What kind of a corn?

MR. EICHORST: Shelled--

THE WITNESS: Shelled corn.

What it is basically is to feed the animals up north in the cold months. A good Samaritan.

BY MR. EICHORST:

Q And then I think you get us to the Split Rock Inn. That in Shawano?

A No, that's in Split Rock.

Q In Split Rock. Around 4:15 or so.

A Approximately, yeah.

Q And you left there around 6?

A My recollection, yeah.

Q Could the time you had spent there been between 4:30 and 6?

A 5--

Q 5 and 6?

A The 5-- I would say 4:15 because Tigerton Feed Mill closes at 4:30, and again my recollection is arriving at Tigerton somewhere around 3:30, you know, stopping at Red Owl and Tigerton Feed Mill, I'd say it would put me at somewhere around 4.

Q So you were at least at the bar for a little over an hour.

A I would say quarter after 4 to 6, that's an hour and 45 minutes, so, yeah, that's over an hour.

Q Could have been an hour and a half though. Could have been less time, correct?

A Oh, it could have been.

Q How many drinks did you have while you were there?

A I remember having 4 or 5.

Q Which one?

A 4 or 5?

Q Yeah.

A I'm not sure. Could have had 4, could have had 5.

Q Could you have had more than 5?

A I don't remember having more than 5.

Q But you could have.

A Yeah, I could have. I don't think so though. My recollection is having 4 or 5 drinks.

Q Have you reviewed your medical records with respect to how many drinks you had? That you told them you had, the medical personnel?

A Oh, yes, I have.

Q And there is some conflicting numbers of drinks, correct?

A Definitely there is.

Q In fact in reviewing your records I believe the Appleton Medical Center, there's a note that you had 5 drinks and I think at the most St. Luke's with a Dr. Kinney said you had between 6 to 8 drinks.

A At the Appleton Medical Center-- There were 3 reports on that. One stated that I had 4 to 5 drinks; had 3 to

4 drinks, on or the other; another one stated, admits to drinking 5 drinks; another one stated, had about 5 drinks.

Q And Dr. Kinney's report says between 6 and 8 also, doesn't it?

A Dr. Kinney?

Q Dr. Kinney at St. Luke's.

A There's a Dr. Goldman that had made that statement. I think Dr. Kinney was the consulting doctor, because Dr. Goldman was the one that signed my report.

Q Dr. Kinney signed the report and it's dated 2/3/96, consult, in which he suggests, "Mr. Larsen's history is notable for taking a trip up to the Shawano area on 1/31/96 where he apparently has a trailer. After a drinking binge consisting of 6 to 8 drinks, he attempted to go home about 6 o'clock at night."

A Yes, I saw that in the report.

Q Do you remember making those statements to him?

A I did not make those statements.

Q Now you didn't need to stop off the bar or drink alcohol as part of the business, did you?

A No, I did not.

Q You weren't meeting any customers there to do any paperwork together, were you?

A No, I was not.

Q So an intake of alcohol be it 5 drinks or 8 drinks is purely personal to you, correct?

A Well the intake of the 4 or 5 drinks is a method of relaxation. To stop and relax. It had nothing to do with business.

Q In fact I think that the records suggest that at least some of the doctors feel that you're an alcohol abuser.

A Yes, I saw in there past history of alcohol abuse. It kind of surprised me because I remember thinking, there is no history of alcohol abuse that I'm aware of.

Q However you offered information that you had between 7 and 8 drinks in the evening--

A Offered? I was asked the question, what do I routinely drink? My answer to that was, it's not uncommon, and again I might word it differently, but it's not uncommon for me to have 4 to 5 drinks if I need it. And I said I didn't drink 7 days a week.
I remember at one of those places I was at, do you ever drink 7 or 8 drinks, my answer to that was, yes, I have drank 7 or 8 drinks at one time.

Q In fact most of the medical facilities that treated you asked you a question about your alcohol intake, one way or another they found out that you-- It was your opinion that you drank between 7 and 8 drinks a day.

A No, it was not.

Q So all of the records are lying, correct?

MR. WARD: Objection. That question is argumentative, Judge.

To ask him whether or not the record lies, first of all is argumentative; secondly it's asking him to answer questions that he cannot answer.

JUDGE RYAN: Sustained, do it another way.

BY MR. EICHORST:

Q If a medical provider has indicated in the records through a history that you had commented to having between 7 and 8 drinks a day, would that be-- on a routine basis, would that be true or untrue.

A That would be untrue.

Q And in fact you having reviewed all of your medical records see that throughout the medical records that that statement appears.

A Yes, I do see that statement appearing, and I also found out why that statement appears.

I also-- I'll stop.

Q Let me ask you this, are you telling us that in your opinion you're not an abuser of alcohol?

A I don't think I'm an abuser of alcohol.

I can tell you what I drink on a routine basis. If you were to ask a doctor he would say, he's an alcoholic drinker because one physical I went to a doctor told

me, you know, if you drink more than one drink a day, you're an alcohol abuser.

I drink on an-- I drink routinely 3, 4, 5 drinks a day and I don't feel I'm an alcohol abuser. I drink to relax.

Q So how many drinks are you admitting to routinely drinking on a routine basis?

A Routine basis I would say it's not uncommon for me to drink after a day at work I'll come home and drink 4 or 5 mixed drinks and 5 days a week.

That would be par for the course.

Q Now the evening in question after you had purchased the Kessler's and Diet Coke at the Red Owl, I think you said--

A Correct.

Q --it was your intention to go to Split Rock, have between what you say, 4 to 5 drinks, return back to the trailer, pop in a pizza, have a couple more drinks, and do some sales work?

A Well basically it was my intention to stop at the Split Rock Inn and have a couple of drinks, you know, say hi to a couple of friends if they were in there, relax for a little bit, go back to the mobile home sales office, pop in a pizza, work on sales work and I'd probably have another couple of drinks.

Q Okay.

A That was my plan.

Q How large were the drinks at the Split Rock Inn? I'm not familiar with the Kessler and Coke--

A I don't know. I would say probably the same as most mixed drinks.

Q What is that? 10 ounces? 12 ounces?

MR. WARD: If you know.

THE WITNESS: I'm guess, I'm not sure. I'm not sure.

MR. WARD: Don't guess.

THE WITNESS: I'm not sure. The standard mix drink size.

BY MR. EICHORST:

Q You can tell me if you don't know, are you aware of the phenomenon that an alcoholic or alcohol abusers use Dexatrim in order to reduce the effects of alcohol?

A No, I'm not aware of that.

Q What was your weight at the time of the accident?

A I think 190 pounds, approximately, you know.

Q In reviewing the medical records, could you tell us what your blood alcohol content was approximately 15 hours after the accident?

A .004.

Q And I believe your testimony was that when you left the

Split Rock Inn you felt no effects of the alcohol that you had been consuming that evening or at least you didn't feel intoxicated.

A I did not feel intoxicated.

Q Are you a person, if you know, are you a person with a high tolerance for alcohol?

A I think-- I think I am only because I routinely drink as I stated, 4 to 5 drinks. I would probably be able to tolerate more than somebody that doesn't drink at all.

Q Why is that?

A If somebody does not drink, I would suspect they would be more susceptible.

Q And you drink routinely.

A Well, as I stated, I routinely probably 5 days a week drink 3, 4, 5 drinks a night.

Q Are you still drinking today?

A Yes, I am.

Q Same amount?

A No.

Q Cut back?

A Oh, yes, cut back.

Q What have you cut back to on a daily basis or as a routine?

A Routinely normally whenever we go out for dinner,

whatever, I drink non-alcoholic beer. Since the accident there's only been one time where I've been out at a place to eat or anywhere, you know, out one time I had one can of regular beer because they didn't have any non-alcoholic, other than that I've been strictly non-alcohol since I went out.

Q Since the accident you know longer use alcohol?

A No, since the accident when I've gone out with the exception of one can of beer, no, I know longer use alcohol.

Q Do you use alcohol at home?

A The only place I've used alcohol is at the trailer up north.

Q Is what?

A At the trailer up north I do occasionally.

Q And you've been up to the trailer since the accident?

A Oh, yes, not constantly, but I've been up and back a few times.

Q Have you been up there for a month stretch?

A Recently, no. A couple months ago, yes.

Q Okay. Tell me about a couple of months ago. What are we talking about? Was that March, February, April?

A When I was up there?

Q Yeah.

A Well I was up there in January.

Q I'll do it easier. Your accident happened in January, 1996. Were-- I believe that maybe this is a false assumption, but were you up there in April of 1997?

A That was last month.

Q Or 1996. Sorry.

A To my knowledge, no.

Q You weren't?

A No. I was recuperating. You know, I spent a lot of time in hospitals, I spent a lot of time in nursing homes.

Q How about in March of 1997, did you change your address to the trailer address up in Tigerton?

A March of 1977?

Q Yeah.

A Yeah, I spent a few weeks up there.

Q Did you tell your attorney that that was your address now?

A No, I talked to his secretary and I had told her, I said, if he wanted to reach me, you know, I'm at the mobile home, this is the phone number. You know, if she had reason to get a hold of me, that's where she could contact me at.

Q So you did not tell her this is your address if you want to notify the Department.

A I did not tell her to notify anyone.

Q Who are we talking about?

A It's Bob's secretary, Mary or Lisa.

Q Did you call in April of 1997 and say, hey, my current address is back in Cudahy. I'm back at home. And I mean the East Holmes address, did you do that? Make that phone call?

A Oh, I'm sure I called and either talked to Bob Ward or his girl and say, hey, if you have to reach me, this is the number that I can be reached at.

Q Is it safe to say between that period of time, March 13th and April 7th, you were exclusively up at the trailer?

A March 13th?

Q Yes.

A And April 7th?

Q Yes.

A I'm not sure.

Q And I think you also testified that back in 1996, in April of 1996 you didn't travel up to the trailer, to the mobile home?

A No, to my knowledge I did not.

Q May, 1996, were you up there?

A To my knowledge, no.

Q June?

A To my knowledge, no.

Q July?

A Boy, I'm not sure. I could have been.

Q You certainly went up for their hunting season in 1996 which would have been what? November?

A This last hunting season?

Q Yeah, this last hunting season.

A I certainly did.

Q So we know for a fact you were up there in November.

A I spent a lot of time up there.

In fact I got a cross bow since the accident.

Q Okay. Did you make any sales calls while you were up there after the accident?

A Not that I can recall.

Q Not that you recall or it didn't happen?

A Well, I've had people call me. I routinely still get calls up there that are business related.

Q Are you totally out of the loop with respect to Larsen Laboratories today?

A No, sir.

Q You're-- Are you still actively employed there?

A No, not really. I do spend some time there, yes.

Q Do you still make sales calls?

A Very rarely.

Q You do though.

A Whenever I can, yes.

Q And there have been occasions while you were up north that you made sales calls or at least taken sales calls while you were up there since the accident?

A Yes, that is true.

Q Have you, and I believe we've already established this, you've not called on Arrow since the accident, have you?

A That's correct, I have not.

Q You haven't called on anyone else up there since the accident, have you?

A No, I have not.

Q You haven't made any personal visits to any other companies since the accident; is that true?

A That is true.

Q Any contact you would have would be by phone?

A Very little.

Q Is now the sales office up north closed because you're no longer working up there?

A For all intents and purposes, yes.

Q It's done?

A Eventually I hope to eventually to get back into Larsen Laboratories and work on sales, and right now I'm trying to get back in, it's just that it's a long road to hoe right now.

Q And I think you've testified to the fact that you don't

know why you passed out or fainted on the evening in question, do you?

A That is correct.

Q However doctors have at least hypothesized with respect to why you passed out and fainted; isn't that true?

A They given me some reasons, possibilities.

Q And they're documented in here, correct?

A Correct.

Q In fact 2 doctors have suggested that the reason why you passed out was because of the alcohol that you were drinking that evening; isn't that true?

A I don't know if 2 doctors suggested that or not. I know that was one of the possibilities or one of the items mentioned.

Q Okay. In fact the history and physical consultation notes by Dr. Evan from Appleton suggests that there are numerous ideologies, one would be cardiac related, either asemia and a renal problem due to alcohol and/or due to Dexatrim, or vascular heart disease. You've looked at that note, haven't you?

A Yes, I have.

Q And since the accident have there been any conclusive tests done on you which would support that either you had a cardiac problem or any other problem listed by Dr. Evan here as a cause of your passing out and

fainting?

A I don't know. I know that Dr. Lodi my physician at Family Health has run one heck of a lot of tests.

Q And they've all been negative?

A I don't know.

Q Or the record would reflect that.

A You'd have to ask Dr. Lodi.

Q And the St. Luke's Medical Center, now that's the medical center you were transported to, the Appleton Center up north, correct?

A Correct.

Q And you saw Dr. Goldman there.

A Correct.

Q And you saw Dr. Hannah for acute renal failure.

A Dr. Hannah? I don't really remember him. Dr. Goldman I do remember.

Q Okay. And on that February 2, 1996 report, the impressions on page 2 of that report, ethanol abuse and loss of consciousness secondary to the alcohol, do you see that? Did you review that record?

JUDGE RYAN: What date did you say?

MR. EICHORST: February 2nd of 1996. I believe that's his first day there at St. Luke's.

JUDGE RYAN: And you said St. Luke's?

MR. EICHORST: St. Luke's, yes, Dr. Hannah.

BY MR. EICHORST:

Q Do you recall any of the doctors there telling you face-to-face that that's the reason why you lost consciousness?

A Nobody did, but I do remember one doctor telling me that there could be a number of reasons, that being one of them, Dexatrim being another possibility.

Q Did they know which--

A They didn't know.

Q Do you know that alcohol and Dexatrim could potentially be a lethal combination?

A No, I do not.

Q Okay. Is it a fair statement to say that the work that you were claiming you were doing up there or at least intending to do on that day or the next day wasn't the reason why you fell unconscious and passed out? The work wasn't the cause of the injury, was it?

A Well the reason I was up there was because of my work. I don't know how to answer your question.

Q Well you didn't fall off a ladder or you didn't fall out of your car. As far as we know from reviewing the medical records and listening to your testimony, you went to Split Rock, you had a number of drinks, you drove home and you passed out. Does that sound like you're performing any work?

MR. WARD: Well, Judge, I don't--

JUDGE RYAN: Strike that. Strike that.

BY MR. EICHORST:

Q There's no correlation between the two, is there?

A No, there isn't.

Q And other than the causes stated by the doctors in the medical records, you don't know why you passed out, do you?

A No, I don't.

Q You certainly didn't pass out because you were--
Strike that.
When you were transported to these medical facilities, did a nurse or any attendant take any insurance information down from you? Ask you any questions in that regard?

A Emergency room, Shawano, asked if I had insurance and I had stated, yes, and at that time there was a Family Health Insurance card in my wallet and to my knowledge Wally Seefeldt got my wallet and passed this card on to them, but--

Q They asked you and you told them you had insurance?

A I told them I had insurance.

Q You did?

A Yes, I did.

Q You didn't tell them that you were injured due to work

related activities, did you?

A No, I did not.

Q And in fact you in reviewing all these documents I'm assuming that the primary insurance carrier on each one of the documents is your family health carrier and not your worker's compensation carrier; isn't that true? Right?

And the reason for that is you didn't report the accident as a work injury until almost 2 months afterwards.

A Actually I would never have reported it because I was not aware that workerman's comp covered anything other than the physical work place.

Q And who told you that you could potentially may get coverage for your trip up north?

A You mean under worker's compensation?

Q Yeah.

A Ida Mae mentioned that to me after she did a little more checking on insurance and taking with people that workman's compensation might cover that injury.

Q Did she tell you who she talked to?

A If she did I don't remember.

Q Did you talk to any attorneys before going to see Mr. Ward?

MR. WARD: Why would that be relevant, Judge?

JUDGE RYAN: You're asking me why it would be relevant?

MR. WARD: No, that would be an objection.

MR. EICHORST: It's relevant, Judge, because almost 2 months after the accident we were told that he was going up there on a business trip and the reason I want the question answered is because I want to know who told him if he was up there on a business trip he may be covered for worker's comp.

THE WITNESS: Actually--

MR. WARD: Wait.

JUDGE RYAN: Overruled. You can answer.

THE WITNESS: Okay.

JUDGE RYAN: You can answer.

THE WITNESS: You can answer--

JUDGE RYAN: You are authorized to answer. I'm the one that rules whether you are authorized to answer.

THE WITNESS: I am authorized to answer who told me that worker's comp might cover it?

BY MR. EICHORST:

Q Or who told Ida Mae.

A That I don't know.

Q You don't know who would have?

A Well I think it was a combination. Number one, Ida Mae

mentioned she thought it was covered. Number two, Kelly Cavanaugh when he took the statement from me at Mount Carmel told me that salesmen were covered 7 days a week.

Q Let's stop right there.

Kelly Cavanaugh took your statement right after you filed the claim.

I want to know who told you prior to notifying Heritage Insurance of the workman's comp claim. Who told you that you might be covered if you were traveling up there on a business trip?

MR. WARD: I may have already made this objection but what is the relevancy on how he found out that he might be covered under workman's comp?

JUDGE RYAN: Well I overruled the objection when you objected to his question before.

I'm permitting the question and I told your witness that he will be permitted to answer.

That's where we are now.

MR. WARD: Okay. And I guess I'm renewing my objection and I'm requesting Your Honor to advise me as to the relevance.

JUDGE RYAN: I don't-- I'm not going to teach a course in evidence. I have made my ruling. We don't do sidebars like they did out in California

and spend months in trial.

I've made my ruling and you have renewed your objection and I will invite you now to have for the record a continuing objection on the record and I will say fine, noted for the record.

Now let's get on with the hearing.

THE WITNESS: Okay. I was not aware that I was covered by workman's compensation until Ida Mae had mentioned to me that you may be covered.

BY MR. EICHORST:

Q Ida Mae is the only person that told you you may be covered if you were up there on a business trip?

A To my knowledge, yes.

Q You didn't talk to any attorneys?

A At that time, no.

Q Okay.

A In fact I did not talk to any attorneys until my claim was denied.

Q Okay. Your testimony is that you did not know your claim may be compensable, that's why you didn't file it until 2 months after the accident?

A Correct. I did not know workerman's compensation covered me in that situation.

Q Again, is there a reason why at least you didn't tell or it's not memorialized within the medical records

that Bill Larsen's up north on a business trip aside from being up north checking on the trailer?

A I didn't really see any-- Well, number one, I was in a lot of pain. Two, I really didn't see no reason why I should tell these hospitals and doctors, hey, I went up there to call on Arrow Electric. I see no reason to it.

MR. EICHORST: Give me 2 seconds, Judge. I may be finished.

JUDGE RYAN: Yes.

BY MR. EICHORST:

Q It's not uncommon for you to travel up north and stay at your trailer for a week or 2 weeks at a time; is it?

A No, it is not.

Q And other than avoiding the noise at Larsen Laboratories in Oak Creek, there's no reason for you to travel up to Tigerton to perform your business duties, is there?

A Yeah, there is.

Q Okay.

A I enjoy it.

Q You enjoy it?

A Sure I do. The way I look at it, you know, we got a business, I got a sales office in Oak Creek which I make a lot of sales calls out of, I got a sales office

up in Tigerton which I make a lot of sales calls out of.

Personally I'd rather be at the sales office in Tigerton, and, you know, I could do one heck of a good job on sales whether I'm up there or down here.

Q You enjoy the outdoors, correct?

A Yes, I do.

Q Do you have any documents that you're going to produce to us today, and I think I may have already asked this question, which would memorialize-- or at least do you have a business presentation you were going to give to Arrow Electric on that Thursday or Friday?

Let me strike that.

Had you prepared any business document or any presentation?

A No, I have a mental presentation whenever I go into a customer and try to get their business.

Q So if we would have looked in your car after the accident we weren't going to find any business proposal or documentation that would suggest that on February 1st of 1996, or February 2nd of 1996, here's my presentation to Arrow Electric. We wouldn't see anything like that, would we?

A No, you wouldn't. The only thing you'd see is my sales paperwork.

Q And you haven't brought any sales paperwork today to this hearing other than the December 26, 1996 letter to Rex Harrison and which is Exhibit G, and Exhibit J which memorializes any conversations or business dealings you had with Arrow?

A That is correct.

Q You bought the trailer after you discontinued doing business with Arrow; isn't that correct?

A That is correct.

Q You hadn't done business with them since 1988 and you purchased the trailer in 1991; is that correct?

A Correct.

Q Do you have any documentation you made calls on them between 1988 and 1991 for us today?

A No, I don't. I don't have any documentation on any calls I made during that period.

MR. EICHORST: That's all I have.

JUDGE RYAN: Re-direct?

Re-Direct Examination

By Mr. Ward:

Q In regard to the exhibit that was marked reflecting business done with Arrow Electric in 1987 and 1988, it looks like it starts in October of 1987 and it ends in August of 1988, that's right?

A I would say so.

Q So it looks like about a 10 month period of time, correct?

A Correct.

Q And I think you based on his computation testified that that's an average of about $250 per month worth of business; is that correct?

A If that's what it computes out to.

Q Okay. It looks like you, know, the average-- maybe the average for the business during that time period was about $10,000 a month, does that seem about right? Average income for about a month?

A It could be. I would think it would be higher than that. It-- In that period, Bob, you know, I'm not sure.

Q Okay. So would Arrow Electric's business during that time period would have constituted what? 3 to 5 percent of the total business? Does that make sense to you?

A It would have been a small percentage to you, but an important percentage to me.

Q Is that significant?

A Yes, it is.

Q In regards-- I think Counsel asked you some questions about a history in a Dr. Lorton's records.

A Dr. William Lorton.

Q Dr. Lorton was a psychiatrist to whom you were referred when it became evident that you were going to have your fingers amputated, correct?

A Correct.

Q The medical people wanted you to go to him for counseling.

A Family Health wanted me to go to him because of the amputation.

Q In Dr. Lorton's records there was a record of a drinking binge of 6 to 8 drinks, correct?

A In Dr. Lorton's?

Q Yes.

A I don't recall seeing it in Dr. Lorton's records.

Q Specifically you had reviewed that record prior to coming here today.

A Yes, I did.

Q And you had some significant disagreement with the history that he took; is that correct?

A Correct.

Q Okay. Specifically he got your number of children wrong; is that correct?

A That's correct.

Q He got your occupation wrong?

A That is correct.

JUDGE RYAN: What was the first error?

MR. WARD: Number of children.

JUDGE RYAN: Number of children?

MR. WARD: Yes.

JUDGE RYAN: And the second one was occupation?

MR. WARD: Yes.

BY MR. WARD:

Q Is that correct?

A Well there's so many errors in that.

Q I don't need you to detail all of them. What other significant errors is contained in those records.

A Number one, he stated in his first paragraph or second paragraph, he stated the reason I went up north is because I was an avid deer hunter and I went up there on a weekend to hunt deer.

That statement is incorrect because deer hunting season is not open at that time.

Q Was it your habit to hunt deer out of season?

A No, sir.

Another mistake he made here he stated I went into the mobile home and apparently left the door ajar and proceeded to drink a number of drinks and passed out. Well basically it's incorrect because I did not have any drinks in the mobile home.

Q You indicated that it was your routine to drink 4 to 5

drinks nightly as many as 5 nights a week; is that correct?

A Yes, it was not uncommon.

Q Would you have characterized a situation in which you drank 6 drinks to be a drinking binge?

A No, I would not have.

Q Although some people might.

A Yes.

Q But for you at that time that was not an unusual occurrence.

A No, not really.

Q Are you aware of any physician's report where an opinion is rendered that you lost consciousness due to the drinking?

A Not really. What I was told and what I remember is I asked the question, you know, why did this happen, and basically what I was told there is a number of reasons. Alcohol could have been a factor, Dexatrim could have been a factor, there could be heart problems, there could be any number of reasons why.

The other comment, and again I think it was at Appleton, but I was told that it may never happen again. You may never find out the reason why. It can happen again. Just a big unknown.

I didn't get a specific reason why I passed out.

MR. WARD: That's all I have.

Re-Cross

By Mr. Eichorst:

Q Dr. Lorton suggests in his report that, he and his wife have three sons, which is untrue.

A That is correct. We have none.

Q You have a couple of stepsons.

A I have 3 stepsons.

Q I'll go on with his report, in his business which is some kind of metal analysis business, what's wrong with that statement?

A Nothing wrong with that. Metal analysis, yeah, that's a good statement.

Q Maybe I didn't read fully through this whole report, where does he get your occupation wrong?

A Could I dig it out? Could I get my copy of notes I made on that?

Right there-- I can show you it on his report, okay?

JUDGE RYAN: What exhibit is that?

MR. EICHORST: Exhibit 6, Family Health Plan records, psychiatrist consultation with Dr. Lorton.

THE WITNESS: Now are you asking me to point out errors in this?

BY MR. EICHORST:

Q Forgive me if I'm wrong, I think one of the questions

posed to you is that he had got your occupation wrong in the report.

A Well I had made the statement that there are many, many errors in this. I can gladly point them out to you.

Q Well one of the statements that you said was in error is that he got your occupation wrong.

A Well can I go through this and see?

Q Well you can, but is some kind of metal analysis business inaccurate with respect to your occupation?

A If that's his statement, metal analysis, no, that is not inaccurate.

Q Okay.

A But there are many inaccuracies in there. Did you want me to point them out. There are problems in there. He knows it.

Q That's fine.

MR. WARD: What's fine? Do you want him to point them out or not?

MR. EICHORST: If you want them pointed out you can ask him to do that.

JUDGE RYAN: I think his question was specifically occupation, and he asked you where that would be.

MR. EICHORST: Correct.

THE WITNESS: Okay. In the occupation I

don't know if it's in this consultation or if it's the doctor at St. Luke's Hospital, he made the comment that I worked for a mental consulting firm, and I do not. And this error basically-- I mean there's all kinds of errors in it if you want me I can point them out to you. It states that my half-siblings are living in the Milwaukee area. All my half-siblings are dead.

MR. EICHORST: Judge, do you want him to go on?

JUDGE RYAN: That's why I'm here.

THE WITNESS: If you want me to go on--

JUDGE RYAN: Hold it.

MR. EICHORST: My question was specifically with respect to what Mr. Ward had said and that's my only reason for asking that question.

JUDGE RYAN: The two attorneys are going to decide whether to go along with him going through this document and looking for errors.

I gather that you do not desire that.

In fact you suggested that if Attorney Ward wanted that done, he could do that.

I'm not asking for anything.

I'm sitting here taking notes trying to get the questions and answers down, so let's go on with the questions.

BY MR. EICHORST:

Q And then in his report he indicates that, he tends to deny the seriousness of alcohol and doubts very much that his passing out was due to alcohol. He thinks it might have to do with going on diets periodically. Do you buy into that?

A No, I don't.

Q But that at least is one of the causes that has been suggested by many of the physicians; isn't that true?

A The drinking of alcohol and the Dexatrim?

Q The Dexatrim.

A Dexatrim has been mentioned. You know, how significant that is, I don't know. I'm not a doctor.

Q And the reasons mentioned by the physicians who evaluated you at least what we've been talking about, alcohol, die,t or heart problems, are not related to the work activities that you were doing up there, were they?

A Alcohol, diet and heart problems are not related to the work. I'll agree with that. But the reason I was up there--

MR. EICHORST: That's all I have.

Re-Re Direct

By Mr. Ward:

Q I feel compelled to ask you, are there errors in Dr.

Lorton's report that you wanted to point out?

A Yes, there is.

Q All right.

A Many, many errors.

Q Okay. Why don't you take a look at the report and slowly relate the errors that you think are significant.

A All right. It states, I have been found unconscious, not true.

He had gone up there for a weekend as he is an avid deer hunter. Deer hunting is not open at that time of year. It was not a weekend, it was the middle of the week.

It states, I had apparently gone into the mobile home and not shut the door tightly and I had several drinks. I did not have any drinks.

MR. EICHORST: I object to the reading of that. That's not what that document says.

JUDGE RYAN: Well--

THE WITNESS: I'm reading it.

JUDGE RYAN: Just a moment.

MR. EICHORST: Read the--

JUDGE RYAN: Now you just a moment too.

MR. EICHORST: Judge, he's got to read the sentence accurately for the record.

He's reading right off the document.

I don't mean to be disrespectful.

JUDGE RYAN: That is the record. That is the record.

It has been received by stipulation. You have--

You'll have your turn under cross-examination to point out that he's not reading this correctly.

Now I think you were interrupted, it's hard to say where, you started to say, you did not what?

THE WITNESS: I'm trying to read this correctly.

JUDGE RYAN: Well you said I did not say something.

THE WITNESS: I read the statement, he apparently had gone into the mobile home and not shut the door tightly and he had several drinks and passed out.

I did not have several drinks in the mobile home.

Okay. It states, his wife tried to reach him and could not, he did not answer the phone. Now that is correct.

She called a friend nearby and he went there a few hours later and found him unconscious--

BY MR. WARD:

Q William, I'm going to ask you read it to yourself and point out the errors. I don't want you to read the

whole report.

A Okay.

JUDGE RYAN: That's what he really asked you for before.

BY MR. WARD:

Q I don't want you to read the whole report and then pick them out, I want you to pick them out and then read the portion you picked out.

A Can I-- As I go can I just point out the errors?

JUDGE RYAN: I like that suggestion. You do your thinking in your mind, not out loud, then you tell us the answer to the question that he asked.

As I pointed out to one of the attorneys, this document is in the record.

While he's doing that, what obligations do you attorneys have this afternoon? Off the record.

(Discussion off the record.)

JUDGE RYAN: We're back on the record.

MR. WARD: I'm going to withdraw the question.

JUDGE RYAN: You withdraw the question?

MR. WARD: Yes, I do.

JUDGE RYAN: Okay. Do you have another question?

MR. WARD: No, I don't.

JUDGE RYAN: Any further cross?

MR. EICHORST: I don't.

JUDGE RYAN: You rest?

MR. WARD: No, I have a couple more witnesses.

JUDGE RYAN: Next witness. Bring the next witness up.

THE REPORTER: Can we take a break, Judge?

JUDGE RYAN: Sure.

(Recess taken.)

JUDGE RYAN: Whose the next witness?

MR. WARD: I'm going to call Mr. Seefeldt. He did travel from a long distance to be here.

WALLACE SEEFELDT, WITNESS, DULY SWORN

JUDGE RYAN: Spell your last name.

THE WITNESS: S-e-e-f-e-l-d-t.

Direct Examination

By Mr. Ward:

Q Your name is Wally Seefeldt; is that correct?

A Wallace.

Q Yes. And your current address, Mr. Seefeldt?

A 150-- W15838 Seefeldt Road, Tigerton, Wisconsin.

Q And how old are you, Mr. Seefeldt??

A 76.

Q My understanding is that you are currently retired; is

that correct?

A That's right.

Q And prior to retirement you worked as a farmer; is that correct?

A That's right.

Q And how long have you lived at the address where you live at now?

A Almost 76 years.

Q Your whole life.

A Yeah.

Q Okay. You came-- How did you meet Mr. Larsen? You know Mr. Larsen, correct? How did you meet him?

A Through friends. Bill and his wife came to Clint-Mar, that's the supper club between Clintonville and Marion, and friends of ours knew them too, see, and Bill was asking if there was any land up there because Bill was looking for many years for some hunting land up in Tigerton. For 25, 30 years he had hunted in different places, you know, and these friends of ours said maybe me and my wife would sell some land, so then we got together and told Bill he should come up and look at this land they did. I mean Bill came out alone and he looked at it and he walked through the woods there and of course he saw a nice big buck, and so he bought it.

Q Is that the sales buck that you have walk by every time

you try to sell some land?

Anyway, he bought some land in what? 1991?

A Yeah, 1991, I think. I'd have to look at the records.

Q Okay.

A It's '91 I suppose.

Q And he testified that the following Spring after purchasing the land he put a trailer home on the land itself, correct?

A Right.

Q All right. Over that course of time did you become familiar enough with Mr. Larsen so that you maintained a key to his trailer?

A (Witness nods.)

Q You did? Is that a yes?

A Yes.

Q He also indicated that he would have you plow his driveway on occasion; is that correct?

A That's right.

Q I want to focus your attention to the date of January 31, 1996, which is the date that he testified about being injured

A The day before.

Q The day before, right. What was your first contact on that date? The day that he was--

A He had called my wife and asked if I would plow him

out. See I didn't plow him out all the time because if you keep the driveway plowed somebody can go over there and vandalize it, so if the snow is deep they won't go in there, so I don't go over there unless he asks me.

Q So on the morning of January 31, 1996, Mr. Larsen called your home and asked if you'd plow out the driveway in anticipation of his arrival, right?

A Right.

Q After that telephone call, did you in fact go and plow out his driveway that day?

A Yes, after breakfast I went out and plowed him out.

Q Did you see Mr. Larsen arrive on the evening of January 31, 1996?

A No, no. Se we can't-- We have a woods between us. See, we're about a quarter a mile apart and I can't see his trailer house.

Q Okay. When was your next contact with Mr. Larsen?

A The morning when it happened.

Q What happened?

A Well Ida Mae called and says, would you call-- go and check on Bill?

Q Ida Mae is Mr. Larsen's wife and she called your home and asked you to go and check on Bill?

A Yes, she asked, would you call-- would you go up to see because there's something wrong up there. Meanwhile

she called and got a hold of Bill because we had to get dressed, you know, and get the car warmed up and get over there, you know.

Q When you arrived what did you find?

A Bill was in the house, he was in the kitchen.

Q He was up and about?

A Oh, yes.

Q And what observations did you make regarding his physical state? What did you see?

A Well he was hurting.

Q Okay.

A So my wife, she made him coffee.

Q You know, he mentioned that your wife had made coffee and I guess in following to Mr. Eichorst's question, it sent me a signal there must have been water in the trailer to make coffee that morning so the pipes weren't frozen to prevent doing that.

A No, after you turn the heat on, I suppose, they thawed.

Q Okay. Did Bill indicate to you what had happened? Do you recall a conversation with him as to what had happened?

A Just that he had passed out for some reason. He couldn't get the door open, couldn't get the key in, that's what he said. Probably panicked, you know.

Q What observations of the doorway did you see?

A Well the glass was broken. There was glass all over the floor and you could tell where he took the end of his shovel and tried to open it up and he couldn't do it.

Q When Bill called to ask that the driveway be plowed out, did he communicate to you why he was coming up when he asked to have it plow out?

A No-- Well my wife answered the phone so I wouldn't really know.

Q Okay. Now when you came over the following day in the morning on February 1, 1996, Bill indicated that he didn't believe that he was seriously injured, was that in fact what he indicated to you, that he didn't think that he was seriously injured, or was it obvious to you that he was?

A Oh, sure. By looking at him sure.

Q Did you attempt at that time to convince him that he should get some medical care?

A Yes.

Q And he was kind of resistant to that effort?

A I'm all right, he says. I'm all right.

Q He said he was all right.

A Yes.

Q Did he tell you at that time why he was there?

A No.

Q Did he tell you why he had come up to Tigerton?

A Oh, yes, he told me after while after he was just sitting there having his coffee he told me that he was up there to go to Arrow Electric. He told me that.

Q So the morning that he was injured he told you that he was there to visit Arrow Electric.

A That's right.

Q That's your testimony.

A That's right.

Q All right. At the time that he told you that you've already indicated that he didn't even realize that he was seriously injured; is that correct?

A He said I'm all right.

Q There is a reference in the medical records suggesting that Mr. Larsen had traveled to Tigerton to check on his summer home. You heard the question that that is in one of the medical records.

A That's right.

Q My question for you is, you had a key to his property, did you not?

A Yes.

Q All right. Had he ever in the past called you to ask you to check on his summer home?

A Yes.

Q And were you available to do that?

A Yes, I was.

Q And you lived only a quarter mile down the road.

A Yes.

Q You would confirm Mr. Larsen's testimony that January 31st of any year is not a hunting season?

A That's right. Not at 25 below.

Q Well by the calendar it wasn't hunting season; is that right?

A Oh, no, no, no. There's nothing to hunt.

Q And the weather wouldn't have been very good hunting either.

A No.

MR. WARD: That's all I have.

JUDGE RYAN: Cross.

Cross-Examination

By Mr. Eichorst:

Q So when he called you on the morning of January 31st, he didn't tell you why he was coming up there at all.

A No.

Q Do you recall at some point in April-- the date April 18, 1996 talking to a claims investor from Heritage Insurance on the telephone?

A If I did?

Q Do you recall doing that?

A I think there was a call, but what it was about I

don't know.

Q Do you recall telling the claims investigator from Heritage Insurance that you didn't know the reason why Mr. Larsen was up there on January 31, 1996?

A I don't know.

Q Do you recall making that statement?

A No, I don't.

Q Mr. Larsen never told you the morning after the accident that he was traveling up to Arrow Electric, did he?

A Yes, he did.

Q Why didn't you tell the claims investigator that in April?

A I didn't know what it was all about.

I get a call from somebody. He probably never asked me.

Q Have you seen Bill doing-- Mr. Larsen performing work, business duties while up at the trailer since the accident?

Have you observed him doing that?

A I don't think so, no, but I have before. I watched him.

Q Before the accident?

A Before the accident.

Q So your testimony is after the accident you haven't

observed him doing anything business related while up at the trailer.

A Not watching him, but I've seen papers on his desk that he had then, paperwork, that he had been working on.

Q After the accident?

A Yes.

Q You observed him on the telephone in question?

A To hear him talking? No, I didn't.

Q Which faucet did you use to--

A I don't know, my wife did it.

Q Did you check out the faucets personally yourself?

A No.

Q You don't know one way or another if the pipes were frozen or not.

A No, I don't.

MR. EICHORST: That's it.

Re-Direct

By Mr. Ward:

Q Well you know water came out of the faucets, right?

A Well my wife got the water for the coffee, so--

Q She didn't melt snow, did she?

A No.

MR. EICHORST: Object. Calls for speculation.

BY MR. WARD:

Q And further-- I just want to-- I had forgotten to ask you this.

Is it your testimony that prior to January 31, 1996 you had occasion to observe Mr. Larsen using his trailer home for business purposes on several occasions?

A Oh, sure. I was there-- Well this is a year prior or 2 years prior, I was watching him do the faxing, you know.

MR. WARD: That's all.

JUDGE RYAN: Did you have further--

MR. EICHORST: No, thank you, sir. I appreciate your coming.

MR. WARD: It's a long way.

JUDGE RYAN: Any other witnesses?

MR. WARD: I'll call Mrs. Larsen.

IDA MAE LARSEN, WITNESS, DULY SWORN

Direct Examination

By Mr. Ward:

Q State your name, please.

A Ida Mae Larsen.

Q And your current address, Mrs. Larsen?

A 2616 East Holmes Avenue in Cudahy.

Q And how old are you? I'm know I'm not supposed to ask that of a lady.

A (Witness shakes head.)

Q You're not answering.

If you promise to answer all the other question I ask you I won't ask you that question again.

A 53.

Q All right. And you are married to Bill Larsen, correct?

A Correct.

Q And how long have you been married to Bill Larsen?

A Well we're married first in '78, and we got a divorce in '83, and remarried in '89 and we've been married since.

Q All right. You were present during his testimony here today, correct?

A Correct.

Q All right. He indicated that you and he started the business of Larsen Laboratories in 1980; is that correct?

A That's correct.

Q And he indicated that initially his job responsibilities involved most of the technical testing that the business performs; is that correct?

A M-hm.

Q Is that a yes?

A Yes.

Q And then over the course of time his job duties

gradually evolved so that he was more involved with sales and less involved with testing; is that accurate?

A Right.

Q All right. He indicated that the two of you purchased land I think in 1991 in Tigerton; is that correct?

A Correct.

Q And shortly thereafter you put a trailer on the land itself, correct?

A Correct.

Q Initially that trailer was used for recreational purposes only; is that correct?

A Correct.

Q I think he said that it was your idea that maybe you ought to start using it as a combination recreational location and sales office starting I think in the Fall of 1993.

A That was my idea.

Q That was your idea.

A Correct.

Q Okay. So shortly after that time the business card which has been marked as an exhibit would have been developed, correct?

A Correct.

Q Okay. What equipment was installed in your Tigerton office to facilitate its use as a sales office?

A Desk, telephone, fax, calculator, typewriter, Rolodex with our customers names, addresses, phone numbers on it.

Q Okay. Bill indicated that he found that the Tigerton office was more conducive to sales in that it was a less noisy and distractive location. Would you agree with that characterization?

A I would definitely agree with that.

Q Okay. The lab itself-- Is the work that you do in the lab somewhat noisy?

A Correct. A test bar gets machined, it makes a lot of noise; another test bar gets probed, that makes a lot of noise.

Q A lot of fairly small shops that I've been in however there's generally a separation between the office and the lab. Is there a separation at your lab in Oak Creek or is it all kind of one building?

A It's a separation but there's no insulation, it's just like plywood or whatever you call it.

Q What are your job responsibilities for Larsen Laboratories? What do you do?

A Bookkeeping, accounting, invoicing, learning about sales now.

Q If I understand correctly, prior to January 31st of 1996 you and Bill discussed his intention to travel to

Tigerton.

A Correct.

Q Did you discuss the purpose?

A The purpose was for him to go see Arrow Electric.

Q Now we've submitted documentation indicating that he had contacted Arrow Electric by phone and followed up with a letter just about one year previous. Have you seen that documentation?

A Correct.

Q And what was the discussion involving in regard to making an in-person visit on Arrow Electric in connection with this trip on January 31, 1996?

A Well you send them a letter and you try to talk to them on the phone and you try that for so long and if it doesn't work you just stop in and see them.

Q So prior to his leaving on January 31st of 1996, you knew or at least you thought you knew why he was going up there.

A Correct.

Q I think he indicated that he left, to the best of his recollection, around 12:30 in the afternoon, is that about your recollection?

A I wouldn't know. My sister came into town that day and my sister and I left around 11 o'clock to go for lunch.

Q Was Bill at the lab that day?

A He was at the lab when he left.

Q So he would have left from the lab itself.

A Correct.

Q All right. And if I understand correctly your next contact with Bill was the following morning; is that correct?

A Correct.

Q You had made efforts throughout maybe later in the afternoon and then into the evening to contact Bill at the Tigerton trailer; is that correct?

A Correct.

Q You had called.

A Correct.

Q About how many times did you call?

A Starting at 5 o'clock, every hour or half-hour until 11 o'clock that night.

Q Just to see-- Can you corroborate Bill's testimony that prior to January 31st of 1996 there was an answering machine at the Tigerton office that had a business related message?

A That is correct, I made the tape for that answering machine.

Q Now to get back to the events of January 31, 1996, when did you first reestablish contact with Bill?

Well I tried to call from 6 o'clock in the morning on,

and I don't know, I think it was 7 o'clock when I called Wally and Leona because I didn't get an answer, and then I tried Bill again and he answered, and when we talked he just wasn't making any sense or anything, so I called Wally and Leona back and said, you got to get over there right away, something's wrong, he just doesn't even sound right.

JUDGE RYAN: I think your question was when a successful contact was made, and the answer was-- went to attempts.

MR. WARD: Well I think we can walk her through it to clarify it.

JUDGE RYAN: Maybe I misunderstood the question.

I thought you asked when she first made contact.

MR. WARD: And I thought that she answered it but I can give it another try.

JUDGE RYAN: Well--

MR. WARD: Why don't I just give it another try.

JUDGE RYAN: Yeah.

BY MR. WARD:

Q When did you reestablish contact with Bill on February 1, 1996? About what time?

A I think 7, 8 o'clock. 7 or in there.

Q In the morning.

A In the morning, right. In the morning.

Q And I think you indicated that when you talked to him on the phone-- He answered the phone, correct?

A Correct.

Q And he didn't sound right.

A No.

Q Okay. Now was this before or after you had talked with Mr. and Mrs. Seefeldt, do you remember?

A I got a hold of Wally and Leona, and then I got a hold of Bill, and then I called Wally and Leona back.

Q Okay. And the second conversation with Mr. and Mrs. Seefeldt was the one in which you indicated, he doesn't sound right, go over there.

A Yes.

Q All right. When-- Did you talk with Bill or Wally or Mrs. Seefeldt while they were over at that the Tigerton trailer?

A Yes.

Q You were on the phone. And you attempted to convince your husband to seek medical treatment; is that correct?

A Leona called me when they were over there with Bill that they couldn't get Bill to go to the doctor, he didn't think there was anything wrong with him, and so

I--

JUDGE RYAN: The question was whether you attempted to convince your husband to go to the doctor.

THE WITNESS: Yes. Yes.

JUDGE RYAN: Next question.

BY MR. WARD:

Q Okay. And your husband was resistant in that he didn't think that he needed to see a doctor; is that right?

A Correct.

Q So ultimately you and Mr. and Mrs. Seefeldt were able to convince Bill that he should go to the doctor and he was taken to the Shawano Medical Center; is that correct?

A Correct.

Q All right. Now there has been some testimony relative to the fact that your husband admits that he had 4 to 5 drinks prior to leaving consciousness on January 31, 1996. You heard that testimony; is that correct?

A Correct.

Q Now you have indicated you have been married to Mr. Larsen I think for a total of what? 13 years or so?

A Around there.

Q Based on your experience with Bill, was it unusual for him to end a day or after completing his work day to have 4 or 5 drinks? Was it unusual for Bill to have 4

or 5 drinks after the end of the day?

A No.

Q Based on your experience of observing Bill having had that amount to drink, would it be typical for that amount to drink affect his ability to remain conscious for example?

A He would be conscious.

A Had you ever seen your husband pass-out from drinking?

A No.

Q Now Bill testified that in addition to the plan to visit Arrow Electric he also brought up paperwork to be performed while he was at the office. Do you know whether or not that's true?

A That is true.

Q And how do you know that that's true?

A I had to send one of my sons up after the accident to the sales office to bring the paperwork back.

Q So that after the accident Bill's vehicle remained at the Tigerton mobile home; is that correct? For some period of time.

A Until-- Well when my son went to get the paperwork he brought the car back at the same time.

Q Okay.

A Because he and a friend went up there.

Q About how much later did that occur? How much time?

A I don't know. I don't.

Q How is it that you discovered that the paperwork was up there so that you instructed your son to go and get it?

A We had got a new customer that Bill had contacted, they sent us work, I did not know what to charge them and I knew the paperwork or Bill said his sales work was up north, his paperwork with the prices that he had quoted the customer. So I needed that paperwork so I knew what to charge the customer for the work Bill had originally told them. And for any other customer that if got another new customer he had worked with, to know what to charge them.

Q So in addition to the paperwork relating to this one customer that you didn't know how to charge because the paperwork was in Tigerton, was there other paperwork that your sons had brought back that Bill had taken up that he intended to work on?

A Oh, yes.

Q All right. Now your business with Arrow Electric appears to have been focused in 1987 and 1988; is that correct?

A Well approximately.

Q That's what the exhibit seems to show.

Can you verify that your husband made efforts on an annual basis to retain that business after it ended in

1988?

A Verify how? By listening to him? I know that he made phone calls to them.

Q You know he made phone calls?

A I know that. I know that letter was-- I typed the letter.

Q In 1995.

A Correct.

Q All right. Further he testified that on one occasion he called on Arrow Electric while you were present; is that correct?

A Correct.

Q When was that?

A I don't remember.

Q He indicated 1994. Do you disagree with that or did that--

A I just don't remember.

Q All right. But given the circumstances under which you ended up sitting in the car, what was going on?

A I really-- I don't remember. I know I sat in the car but I don't remember why, what for, or anything.

Q You remember traveling to Shawano with your husband and he went inside to make what you felt was a sales call while you waited outside.

A Correct.

Q And that would have been after 1988, correct?

A Yes.

Q And prior to his injury of January 31, 1996.

A Right.

Q But you're not exactly sure of the date.

A No, I'm not. No.

MR. WARD: That's all I have, Judge.

JUDGE RYAN: Cross?

Cross-Examination

By Mr. Eichorst:

Q Ms. Larsen, you've heard Mr. Larsen's testimony with respect to some insurance questions I asked previously, and I would ask you if you know whether the mobile home in Tigerton had ever been listed as an additional business location under your business policy with Larsen Laboratories?

A I don't know. I would have to check our policy. I don't even know if I thought of doing that.

Q By the same token do you or do you not know whether the personal automobiles that-- or at least the personal automobile that Bill was driving the day in question, was that insured by the business under the business policy?

A That was insured under the business policy, correct.

Q It was.

A Correct.

Q Do you have documentation of that?

A I have my insurance policy.

Q Would you--

A I don't have it with me.

Q Let me ask you this, would you be surprised if it doesn't show up on that policy as an insured auto?

A I know we have car insurance.

Q You may have car insurance but that may be under a personal policy, not a business policy; is that correct?

A I'm not understanding the question. Are you asking me if I've got car insurance?

Q I'm asking you if Larsen Laboratories, your company, insured the personal automobile which Bill was-- Mr. Larsen was driving on that day in question.

MR. WARD: For any autos?

MR. EICHORST: I said the auto he was driving the day in question.

THE WITNESS: We have our car insurance. That's what we have is car insurance. I don't know what kind of insurance you're talking about.

BY MR. EICHORST:

Q Do you know the difference between a business auto policy and a personal auto policy?

A No, I do not.

Q You do not.

Are your automobiles insured through your Tigerton address, do you know? Or your address in Cudahy?

A I think one is at Tigerton and the other ones are Cudahy. They're not all in Cudahy.

Q Which ones are insured in Tigerton?

A Probably the Oldsmobile and the Nisson.

Q Oh, there's 2 of them.

A Yes.

Q Okay. Which-- Was Bill driving one of those-- Mr. Larsen driving one of those on the day in question?

A The Nisson is the pick-up truck.

Q Okay. Was he driving the Oldsmobile on January 31st?

A Yes, he was.

Q And what you're telling me is that was insured under the Tigerton address.

A I-- I don't know. I think so. I would have to check. I would have to check that out. I don't know for sure.

Q And if it was insured through the Tigerton address, it would be insured under a personal auto policy, not a business policy; is that true?

A I don't know. I'd have to check.

Q Does anyone else at Larsen Laboratories handle the insurance or the bookkeeping other than you?

A I have an accountant.

Q Okay. But you're the person that handles the insurance, right?

A Yes.

Q And you don't know one way or another if the cars at the Tigerton address is insured under the business policy?

MR. WARD: I think she's answered that question.

MR. EICHORST: Well I think I'm trying to help her--

THE WITNESS: No, you're not, I'm confused.

MR. WARD: Judge, this is an objection. Asked and answered. I think he's asked this question 3 different ways and she said she doesn't know.

JUDGE RYAN: If I understood your last question, sustained.

I think your last question was answered this way, I don't know if that Oldsmobile was insured under our personal auto policy or the business auto policy, and that I think has been at least the second time she answered that she doesn't know.

MR. EICHORST: I'll move on.

JUDGE RYAN: Any further cross?

MR. EICHORST: Yes.

BY MR. EICHORST:

Q Mrs. Larsen, the truth of the matter is that your husband was going up north on January 31st for personal reasons, not for business reasons; is that true?

A No.

Q Well do you recall calling your Family Health Plan, your health insurance carrier the day you found out that Bill was hurt, February 1st?

A I really don't really remember too much of what happened after his accident. I was in shock, I was confused, I was-- I don't remember a whole lot of anything, and there' still things I don't remember.

Q Okay. Well you called Family Health Plan, your health carrier on February 1, 1995, we have the records here, that's Exhibit 6, and it states, wife called, patient up in Shawano attending trailer.

A Attending trailer?

Q That's what you told them.

A No, that's not what I-- How can I tell them attending trailer?

I never said that.

Q Okay. So you're saying you never made that statement.

A No, I never-- Maybe I said he was up in Shawano at the trailer. I could have said at the trailer, but attending the trailer? That trailer doesn't need to be

attended. Wally does it.

Q It's coincidental that that statement's consistent with another that Mr. Larsen made on the report.

A Yes, it's coincidental that people can't get their stories straight or they can't listen when they're supposed to.

Q That's fine. I'm assuming that-- Strike that. When you made that phone call did you tell the person at Family Health Plan that your husband was injured due to traveling up there on work?

A No, I'm sure I didn't. I didn't even know what was wrong with him. I didn't know what was going on. I was in Milwaukee, he was up there.

Q It was not unusual for your husband to travel up to the trailer in Tigerton during the middle of the week, was it?

A No.

Q Often times he traveled up there during the middle of the week and he stayed over the weekend?

A It depends.

Q What would it depend on?

A What he was working on, what he was doing, I don't know.

Q Did he always tell you what he was doing when he traveled up to Tigerton?

A Like what?

Q The last time he told you he was going up there to visit Arrow, on other occasions would he tell you why he was going up there?

A To work on sales.

Q So he always told you he was going to go up there to work on sales?

A Yes.

Q Okay. Did he ever tell you that he was going to go up there and just relax and recreate?

A If he was going deer hunting, I knew he was going deer hunting. You asked him why he was there from the middle of September to the middle of October--

MR. WARD: Ida, he's allowed to ask questions.

THE WITNESS: I'm just saying that that was deer hunting.

BY MR. EICHORST:

Q Ma'am, let me ask the questions, please, that's the way we proceed.

A Okay.

Q So are you saying that other than hunting season he wouldn't go up there for recreation or relaxation purposes?

A No, he did that also.

Q He did that also?

A Yes.

Q Did he also do that when you and he were in marital discord or not getting along?

A Was he gone then?

Q Did he travel up to Tigerton?

A Yes, he did.

Q Isn't it true, Mrs. Larsen, that you and your husband were separated for about 2 years?

A No.

Q Prior to the accident?

A No, I wouldn't say 2 years.

Q What would you say?

A I don't' know. It was on and off.

Q Did you make that statement to a care giver at the Mount Carmel facility?

A That our relationship was on and off? Our marriage was on and off. If I made that statement, I made that statement.

Q Did you make the statement you were separated for 2 years and you were filing for divorce?

A We had been separated but not 2 years. Two years on and off, not 2 full years apart, and I called him and asked for a divorce.

Q Isn't it true, Mrs. Larsen, that unfortunately you

didn't want to take care of your husband after his injury?

A I was not aware of that.

Q Okay. So that's not a true statement?

A I was not aware of that.

Q Okay. So if the records would reflect that you had made statements to care personnel at Mount Carmel that you didn't feel that you could take care of your husband or that you were filing for divorce, does that ring a bell with you?

A It depends on how much care you're talking about giving. He needed so much care. What are you talking about? Are you talking about giving him a bath? Are you talking about bandaging his hands? I don't know what you're talking about.

Q Okay. I'll help you.

MR. WARD: Judge, I have an objection. I don't know how this is relevant whether or not Mrs. Larsen may or may not be willing to provide care to her husband.

MR. EICHORST: May I respond, Judge?

JUDGE RYAN: Yes.

MR. EICHORST: It's relevant because it goes to their marital state. Our position obviously is that they were on the rocks and he was spending months of

his time in Tigerton, that's the reason why it's important.

JUDGE RYAN: Well apparently you have no further argument to make and I'm overruling the objection.

MR. WARD: I did have a further argument to make.

JUDGE RYAN: I was waiting for you to talk.

MR. WARD: I understand that it may be their position that he was spending his time in Tigerton, but I fail to see how her willingness or unwillingness to provide nursing care to her husband goes to that issue.

JUDGE RYAN: I made my ruling. Continue.

BY MR. EICHORST:

Q On March 27, 1996 there's an entry in Mount Carmel's notes which suggests that rider was contacted by this day by residence. Wife, Ida Mae states her and Bill have been separated for 2 years and she is now filing for divorce. Ida states that Bill's drinking problem has caused stress on their relationship for a long time and she was planning to divorce him for a long time. She states, Bill was aware of this but she would help him through his surgery and recovery. Do you remember those statements?

A I do not.

Q What do you recall?

A Do you want to take them one at a time?

MR. WARD: Objection. That's not a question.

JUDGE RYAN: Did you make an objection?

MR. WARD: Yeah, I raised an objection to the question.

JUDGE RYAN: Okay. Sustained. And I think maybe something you said earlier about comments being questions is what you're really saying to me, isn't it?

MR. WARD: Yes.

JUDGE RYAN: Okay. And I'm sustaining your objection and you got 3 minutes left.

MR. EICHORST: Okay, Judge.

BY MR. EICHORST:

Q Rider was contacted this date by residence, wife, Ida Mae, that's true. You recall doing that?

A I don't know what days I was contacted. I just don't recall any of it. I just don't recall.

Q Bill was discharged on April 9th, I believe. Does that sound right?

A I don't recall.

Q Was he discharged to your home from Mount Carmel?

A Yes, he was.

Q Okay. She states, Bill and her have been separated for 2 years and she is now filing for a divorce.

A That was not true.

Q Okay. What's untrue about that?

A We had not been separated for 2 entire full years.

Q Real quick, tell me your separation period if you recall.

A I do not recall.

Q Okay.

A I do not.

Q Were you separated at the time of the accident?

A No.

Q Were you separated at all in 1995?

A Yes.

Q What period of time?

A I do not recall.

Q Couple of months?

A I don't recall.

Q Where did he go when you were separated?

A He would go either up to the mobile home or to a motel on 27th Street.

Q Was there any reason from a business standpoint that your husband needed to practice his sales at the Tigerton address?

Was there some practical reason why he needed to do that?

A To do what?

Q To do his sales out of the Tigerton address?

A It was a lot easier for him. He didn't have the interruptions like he does at the lab here.

Q How far is your Cudahy home from the Oak Creek lab?

A It takes me 10 minutes to get there.

Q He couldn't do that at his Cudahy home? Is it noisy there too?

A No, he couldn't do that.

Q He couldn't do that?

A Not in Cudahy. I have a son that's there and we have company that's in and out.

Q So you couldn't set a room aside for a fax and a phone for the business?

A No, no, out of the question.

Q Isn't it true that the reason why the sales office was moved up to Tigerton, or at least you suggested that the sales office move up to Tigerton in 1993 was because you had marital problems?

A No.

Q The reason was solely for convenience?

A The reason was to use it as a sales office and we were going to be up there working and the boys would be at the lab.

Q You were going to be up there?

A I was up there in the beginning.

Q And you left?

A Yes, because I thought the boys weren't doing a good job at the lab for us.

Q Isn't it true that your business had not done any business with Arrow Electric for approximately the last 10 years?

A Whatever the dates were.

Q And that's reflected in Applicant's Exhibit H.

MR. WARD: We'll stipulate to August, 1988.

MR. EICHORST: Okay.

BY MR. EICHORST:

Q How often would you travel up to the Tigerton address with Bill?

A I don't recall.

Q Would you go up there with him for recreational purposes?

A Yeah.

Q The time that you sat in the car when you say you visited Arrow Electric, were you up there on recreational purposes?

A I do not recall.

Q You may have been, right?

A I do not recall.

Q It sounds like that's the only time that you were involved in visiting the Arrow Electric Company and you

don't recall that time at all?

MR. WARD: I think that questions been asked and answered.

JUDGE RYAN: I can't remember her answer. I'll let him ask it again. If I was sure I was going to be listening to the same thing twice, I would sustain it, and there's support for that that in the Administrative Code, but you got me.

My head is beginning to throb.

MR. EICHORST: I'll strike that.

BY MR. EICHORST:

Q Due to your marital situation in the last 3 or 4 years, would it be unusual for Bill to carry paperwork around with him in an automobile?

A What? I'm sorry, I didn't hear that right.

Q Strike that.

There are times when Bill obviously doesn't stay at the Cudahy home because of marital problems in the last 3 or 4 years, correct?

There have been times like that, correct?

A Correct.

Q And it would not be unusual for him to carry around sales paperwork in his automobile on occasion when he's not coming back home or he's not working in the Oak Creek office, right?

A I don't know what he carries with him. No, I don't.

Q Okay. Do you recognize your husband as an alcohol abuser?

MR. WARD: Objection. Relevancy.

JUDGE RYAN: Yeah, I wonder about that. Why is that relevant?

MR. EICHORST: Well he claims that he's not. I guess I'd like to see if she thinks he is. I think it goes to the relationship.

JUDGE RYAN: Okay. I don't remember that coming up.

MR. EICHORST: I asked him on cross if he was an alcohol abuser and I think his answer was he didn't think he was.

JUDGE RYAN: Overruled. You can answer.

BY MR. EICHORST:

Q Do you think your husband is an abuser of alcohol?

A I wouldn't know.

Q Why is that?

A What is an abuser? If you're talking to a doctor who says one drink a day is an alcoholic-- He can go on a diet and not drink for 2 months. Is that an alcoholic then?

Q Do you use alcohol?

MR. WARD: Why is that relevant?

JUDGE RYAN: Sustained. And now we've run over time.

BY MR. EICHORST:

Q So today your marriage is back together and there's no plans for divorce.

A Not right for today, but I don't know about next week.

Q Have you separated in the last 3 months?

JUDGE RYAN: Did you object?

MR. WARD: I didn't, but maybe I should have.

JUDGE RYAN: Next question.

BY MR. EICHORST:

Q Have you separated in the last 3 months?

A No.

MR. EICHORST: That's all I have.

MR. WARD: No re-direct.

JUDGE RYAN: Off the record.

(Discussion off the record.)

JUDGE RYAN: Back on the record. Next witness.

KELLY CAVANAUGH, WITNESS, DULY SWORN

Direct Examination

By Mr. Eichorst:

Q State your name for the record, please.

A Kelly Cavanaugh, C-a-v-a-n-a-u-g-h.

Q What do you do for an occupation?

A I'm a case handler for Heritage Mutual Insurance Company.

Q And you handled this claim on behalf of Heritage?

A Yes.

Q And you were the claims investigator?

A Yes.

Q And you received notice of this loss I believe sometime in-- March 21st of 1996; is that correct?

A Yes.

Q Did you conduct any type of investigation in respect to the Work Comp Act injuries?

A M-hm.

Q You did?

A Yes.

JUDGE RYAN: Make sure that you verbalize your answer and speak up and look this way instead of that way.

BY MR. EICHORST:

Q Mr. Cavanaugh, do you recall placing a phone call to Mr. Wallace Seefeldt April 18th of 1996?

A Yes.

Q And what was the purpose of that phone call?

A We were doing follow-up investigation on this claim, he apparently was the gentleman who took Mr. Larsen to the hospital and had some contact with him.

Q Okay. This is after you took the recorded statement from Mr. Larsen, correct?

A Yes.

Q And you were following-up on that investigation?

A Yes.

Q And did you have an occasion to ask Mr. Seefeldt if he knew why Mr. Larsen was up in Tigerton?

A Yes.

Q And what did he tell you?

A He stated he did not know.

Q You specifically asked him that question.

A Yes, that was the primary reason I called him.

Q I'm going to show you what's been marked Respondent's Exhibit 10, could you tell me what that is?

A It's the property portion of the Worker's Compensation portion of the policy for this date of injury period.

Q Okay. This is the business policy written by Heritage for Larsen Laboratories.

A Yes.

Q It includes property, auto and work comp.

A Just property and work comp because there was no auto.

Q Okay. And the date on the affidavit on the front which attests that it's a certified policy which runs 11/1/95 to 11/1/96, correct?

A Yes.

Q And that falls within the policy period of the injury?

A Yes.

Q Okay. You've had an opportunity to review this document?

A Yes.

Q And the address for the mobile home at the Tigerton location, is that listed as a property insured under the business policy?

A No.

Q The automobile in question that Mr. Larsen was driving on January 31, 1996 up to Tigerton, was that insured under the business policy?

A No.

Q Do you know what it was insured under?

A I believe-- I believe it was under a personal policy.

Q Okay. And how did you come about that belief?

A I spoke with the agent, Jeff Alma.

Q And you also did some investigation within Heritage Insurance because you folks wrote the policy, correct?

A Correct.

MR. EICHORST: Okay. That's all I have.

JUDGE RYAN: Cross?

Cross-Examination

By Mr. Ward:

Q Mr. Cavanaugh, you are the case handler for this

particular matter; is that correct?

A Yes, sir.

Q Is there a file that reflects your involvement?

A I beg your pardon?

Q Is there a file that reflects your involvement in this case?

A Yes.

Q Do you have it?

A Here with me?

Q Yeah.

A No.

Q Did you know you were going to testify here today?

A Yes.

Q Then where is the case file?

A It's at the office.

Q Were you instructed not to bring it?

A No.

Q Did you review it prior to testifying here today?

A I reviewed the recorded statement that I took and this policy.

Q It's your testimony that you did not review the case file prior to coming here to testify here today?

A I reviewed the-- Yes.

Q Two documents; is that correct?

A Yes.

Q You reviewed the policy?

A Yes.

Q And the case file?

A Well it was because-- Well I got it yesterday so I-- yes, I did.

Q I'm sorry.

A The policy is on the screen, so I needed a hard copy of it so I reviewed it yesterday when I got the hard copy.

Q Did you not bring the case file with you today because you didn't want me to see it?

A No, sir.

Q Why wouldn't you bring the file that reflected your involvement in this case?

A I didn't think I'd have to, sir.

Q Okay. Did you review any documents-- Did you take a statement, a recorded statement from Mr. Seefeldt?

A No, sir.

Q Okay. There is no document that records what you've testified to; is that correct?

A Yes, sir.

Q When was the statement taken?

A I believe the-- It was like the middle of April.

Q You're not sure of the date?

A No, sir.

Q All right. How many statements do you take as a claims

adjuster for Heritage Insurance Company?

A Could you clarify that? I don't understand.

Q On a weekly basis--

A Recorded statements?

Q Statements of the type that you're talking about in this case.

A From witnesses?

Q Witnesses or claimants.

A I would say anywhere from 3 to 8 per week.

Q 3 to 8 per week?

A Somewhere in there.

Q And this one would have taken place over a year ago; is that correct?

A Yes, sir.

Q You're not sure of the date?

A No, sir.

Q Is there a document that reflects the date?

A Not that I'm aware of.

Q Well did you document the conversation?

A Yes, sir.

Q Where?

A It would have been in our-- We have logs we keep.

Q And did you review that before testifying here today?

A I didn't need to.

Q So that would be no, isn't it?

A Yes, sir.

Q Does the log indicate what specific questions you asked Mr. Seefeldt?

A Not that I recall.

Q Are you saying that Mr. Seefeldt is lying?

A No, sir.

Q In the course of your investigation of this file, did you attempt to obtain a medical opinion as to whether or not Mr. Larsen's alcohol consumption contributed to this accident?

A No, sir.

Q Are you aware of any doctor that renders that opinion?

A I don't recall.

Q Are you aware of any doctor that says Mr. Larsen was intoxicated at the time of the accident?

A I don't recall.

MR. WARD: That's all I have.

Re-Direct Examination

By Mr. Eichorst:

Q Mr. Cavanaugh, this is a large potential loss for Heritage Insurance; is it not?

A It is.

Q And it's an important claim.

A Yes.

Q And it was very important for you to call Mr. Seefeldt

and ask him if Mr. Larsen had told him about traveling to Tigerton on business; isn't that true?

MR. WARD: I'm going to object to that, that is a leading question.

JUDGE RYAN: Read that back.

(Question read back.)

JUDGE RYAN: Sustained.

MR. EICHORST:

Q Do you recall asking Mr. Seefeldt asking Mr. Larsen why he was traveling up to Tigerton?

A Yes.

Q What did he tell you?

A He told me he did not know.

Q So when Mr. Seefeldt testified today about Mr. Larsen telling him why he traveled up to Tigerton, that's a different statement than he made to you in April of '96 approximately, correct?

A Yes.

Q And you recall that independently of reviewing any log or notes.

A Yes.

MR. EICHORST: That's all I have.

Re-Cross Examination

By Mr. Ward:

Q Did you also talk to Mrs. Seefeldt?

A No, sir, I did not.

Q Did you talk to a-- the bartender at the Split Rock Inn?

MR. EICHORST: That's outside the scope of direct.

MR. WARD: Judge, I can cross-examine.

JUDGE RYAN: Overruled.

BY MR. WARD:

Q Did you talk to a bartender at the Split Rock Inn?

A Yes.

Q And did you ask him about Mr. Larsen's alcohol consumption?

A No.

Q You didn't ask him how much Mr. Larsen had to drink?

A Okay. Do you mean that night or do you mean in general?

I'm confused.

Q Did you ask the bartender who was on duty on January 31, 1996 how much Mr. Larsen had to drink on that day?

A No.

Q Did you ask the bartender whether or not he observed Mr. Larsen as to whether or not he was intoxicated?

A No.

Q Did you take a statement from the bartender?

A No.

MR. WARD: That's it.

JUDGE RYAN: Anything?

MR. EICHORST: No.

JUDGE RYAN: Okay. I'll receive the exhibits at this time and the record is now closed.

(Applicant Exhibits A - J received.)

(Respondent Exhibits 1 - 9 received.

(12:20 p.m., hearing concluded.)

* * *

STATE OF WISCONSIN)

MILWAUKEE COUNTY)

I, JANICE K. KUHARSKE, with the firm of Schindhelm & Associates, Inc., 606 East Wisconsin Avenue, Suite 250 Milwaukee, Wisconsin, do hereby certify that I reported the foregoing proceedings had on May 21, 1997, and that the same is true and correct in accordance with my original machine shorthand notes taken at said time and place.

Janice K. Kuharske

Court Reporter

Dated this 17th day of September, 1997.

Milwaukee, Wisconsin

STATE OF WISCONSIN
LABOR AND INDUSTRY REVIEW COMMISSION
P O BOX 8126, MADISON, WI 53708-8126 (608/266-9850)

WILLIAM E LARSEN, Applicant
2616 E HOLMES AVE
CUDAHY WI 53110

WORKER'S COMPENSATION DECISION

Claim No. 96021617
S. S. No. 389-38-1329

LARSEN LABORATORIES INC, Employer
250 E OAK ST
OAK CREEK WI 53154

SEE ENCLOSURE AS TO TIME LIMIT AND PROCEDURES ON FURTHER APPEAL

HERITAGE MUTUAL INSURANCE CO, Insurer
2800 S TAYLOR DR
SHEBOYGAN WI 53082

The applicant submitted a petition for commission review alleging error in the administrative law judge's Findings and Order issued in this matter on August 18, 1997. Respondents submitted an answer to the petition and briefs were submitted by the parties. At issue are whether the applicant sustained an injury arising out of and in the course of his employment with the employer, and if so, nature and extent of disability, liability for medical expense, and a 30-day notice issue under Wis. Stat. § 102.12.

The commission has carefully reviewed the entire record in this matter, and after consultation with the administrative law judge regarding the credibility and demeanor of the witnesses,

hereby reverses his Findings and Order. The commission makes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The applicant, whose birthdate is July 16, 1941, is president and half owner of the employer, a small company which performs spectrographic analysis and physical testing of metals. The company is located in Oak Creek, Wisconsin, and the applicant and his wife, who is the other half owner of the company, reside in Cudahy. The applicant performed management and operational duties for the business, but his primary responsibilities were sales and computer programming. The company's customers are far flung so the applicant occasionally traveled, not only to see current customers but to solicit new ones.

In 1991, the applicant and his wife purchased forty acres of land near Tigerton, Wisconsin, and placed a mobile home on the land in 1992. Initially, the applicant used the land and mobile home solely for recreational purposes, as he is an avid hunter. However, in the fall of 1993, the applicant began using the mobile home as a company sales office, in addition to its recreational use. The applicant would use the trailer as a base from which to make sales calls, and also a quiet place to perform paperwork related to the business. The applicant also used the trailer as an occasional residence, when he and his wife were not getting along. He and his wife were divorced in 1983 and remarried in 1984.

On Wednesday, January 31, 1996, at approximately 12:30 p.m., the applicant left the company office in Oak Creek to drive to the trailer in Tigerton. He told his wife he planned to stay overnight there and then make a sales call on a prior customer, Aarrow Electric, located nearby in Shawano. He also took some company paperwork with him, and planned to work on it in the trailer. It took him approximately three hours to drive to Tigerton. There he first bought some groceries, liquor, and feed corn to give to the deer, and then went to a tavern. He had four or five drinks of whiskey and diet coke, something he did after work four or five nights per week. He had also taken a couple of Dexatrim diet pills. He then drove directly to the trailer where he intended to fix a pizza and work on sales.

It was approximately 25 degrees below zero when the applicant reached the trailer. He was unable to open the trailer door, because the key he was using was a copy made from his wife's keys. He had lost his keys while bow hunting the previous December. He also found himself feeling dizzy and suffering from a slight headache. After unsuccessfully attempting to push and pry the door open, he broke a small, plastic window in the door and reached through it to turn the lock from the inside. The applicant does not recall what happened next, until he woke up at about 8:45 a.m. the following morning, lying on the floor next to the door. The door and storm door were open about one foot, and the applicant's fingers and toes were frostbitten.

The applicant's wife had been attempting to telephone him, and finally got him to answer the phone when he woke up. She knew he did not sound well when she talked to him, so she telephoned a neighbor, Wally Seefeldt, and asked him to go over and check on the applicant. Seefeldt and his wife found the applicant awake. They made coffee for him and talked to him in the kitchen of the trailer. At that time, the applicant told Seefeldt he had come up to Tigerton to go to Aarrow Electric. The Seefeldts took the applicant to the hospital, and ultimately all the applicant's fingers and most of each thumb were amputated due to the frostbite which caused gangrene.

The credible evidence leads to the inference that the applicant's purpose in going to Tigerton on January 31, 1996, was business related. The applicant had recently discussed his company's service prices with a representative of Aarrow Electric, as verified by the applicant's testimony and a copy of a letter from him to Aarrow Electric dated January 26, 1996. The applicant's company needed to obtain a technical certification before it could restart business with Aarrow Electric, but the applicant credibly testified that his company would not obtain such certification unless it had business from a customer which required it. Furthermore, the commission infers that it is unlikely that absent a business purpose, the applicant would have driven the significant distance to Tigerton at that time of year and in such severe weather. The applicant credibly testified that he had not been fighting with his wife and that he never

hunted at that time of year. Had he been concerned about the condition of his trailer, Mr. Seefeldt was a phone call away, and testified that he had a key to the trailer. In fact, the applicant telephoned Mr. Seefeldt the morning of January 31, 1996, and asked him to plow out the driveway to the trailer, in anticipation of his arrival.

Accordingly, on January 31, 1996, the applicant was a traveling employe pursuant to Wis. Stat. § 102.03(1)(f). That statute provides that every traveling employe is covered for worker's compensation purposes at all times while on a trip, including all acts reasonably necessary for living or incidental thereto, except when engaged in a deviation for a private or a personal purpose. When injured, the applicant was simply attempting to enter his domicile for the night, an act reasonably necessary for living. Utilizing the positional risk analysis, the zone of special danger to which the applicant was exposed was the extremely cold weather in Tigerton that night, and it was by reason of an employment activity (sheltering himself for the night) that the applicant was exposed to this special danger.

The fact that the applicant had a number of drinks prior to returning to the trailer does not defeat his claim under Ch. 102. Regardless of any personal opinions one might have about the applicant's drinking habits, the fact is that he routinely drank as much as he did the evening of January 31, 1996, and when the accident and injury occurred the applicant was in the process of entering the trailer. Even were it to be found that the

applicant had deviated from acts reasonably necessary for living by going to the tavern, a finding which the commission does not make, it would have to be found that the deviation had ceased by the time the applicant arrived at the trailer. As was stated in ***Lager v. ILHR Dept.***, 50 Wis. 2d 651, 185 N.W. 2d 300 (1971):

> "It is clear, as a matter of law, that, in the event a salesman commences travel in the course of his employment and subsequently deviates from that employment but later resumes his route which he would have to follow in the pursuance of his employer's business, the deviation has ceased and he is performing services incidental to and growing out of his employment." ***Id.*** at 661.

While the applicant's drinking may or may not have contributed to his syncopal episode, even assuming that it did, intoxication alone does not defeat a worker's compensation claim but only decreases the benefits. ***Phillips v. ILHR Dept.***, 56 Wis. 2d 569, 579, 202 N.W.2d 249 (1972); ***Dibble v. ILHR Dept.***, 40 Wis. 2d 341, 350, 161 N.W.2d 913 (1968). The determinative fact in this traveling employe case is the fact that the applicant was performing acts reasonably necessary to living when his injury occurred.

The commission infers from the applicant's testimony concerning how much he drank at the tavern on January 31, 1996, that he was intoxicated. It additionally infers that this intoxication was a substantial factor in causing the applicant's frostbite injuries, because it is probable that he remained asleep for such an extended period due in part to his intoxication. Therefore, pursuant to Wis. Stat. § 102.58, all

temporary disability and permanent disability awarded to the applicant will be reduced by 15 percent.

Although the respondents did not submit arguments to the commission concerning the 30-day notice issue under Wis. Stat. § 102.12, this issue was raised in the answer to the application. The commission finds that the circumstances of this injury were unusual enough that it is credible and reasonable that the applicant did not immediately understand that his injury was related to his employment. Regardless, there has been no showing that the employer was misled by the applicant's failure to give notice within 30 days of the injury.

The applicant's conceded average weekly wage is $576.92, which translates into a weekly temporary total disability rate of $384.62. The 15 percent reduction brings the temporary total disability rate to $326.93 per week. The medical opinions demonstrate temporary total disability from February 1, 1996 to the date the hearing was held on May 21, 1997, a period of exactly 68 weeks. Temporary total disability up to the date of hearing therefore amounts to $22,231.24, less $3,461.58 previously paid, for a net amount due of $18,769.66. A 20 percent attorney's fee will be subtracted from this award.

The applicant has also incurred reasonably required medical expenses as enumerated in Applicant's Exhibit E, requiring reimbursement of $44,809.33 to the nonindustrial insurance carrier, Family Health Plan, and $612.00 to Curative Rehabilitation Services.

Dr. Watchmaker's opinion leads to the credible inference that as of the hearing date, it was too early to assess permanent disability, and that the order should be left interlocutory with respect to additional disability and medical care.

NOW, THEREFORE, this

INTERLOCUTORY ORDER

The administrative law judge's Findings and Order are reversed. Within 30 days from this date, the employer and its insurance carrier shall pay to the applicant compensation for temporary total disability in the amount of Fifteen thousand, fifteen dollars and seventy-three cents ($15,015.73); to applicant's attorney, Robert Ward, fees in the amount of Three thousand, seven hundred fifty-three dollars and ninety-three cents ($3,753.93); to Family Health Plan the sum of Forty-four thousand, eight hundred and nine dollars and thirty-three cents ($44,809.33); and to Curative Rehabilitation Services the sum of Six hundred, twelve dollars ($612.00).

Jurisdiction is reserved for such further findings and orders as may be warranted.

Dated and mailed

MAR 31 1998

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David B. Falstad, Chairman

Pamela I. Anderson, Commissioner

James A. Rutkowski, Commissioner

MEMORANDUM OPINION

The only issue of witness credibility entering into the commission's decision was the factual issue of what reason(s) the applicant had for traveling to his trailer in Tigerton on January 31, 1996. In consultation with the commission, the administrative law judge indicated that he was not entirely certain why the applicant took the trip, although he believed that it was probably taken both to check on the trailer and to call on Aarrow Electric.

The above findings detail the commission's reasons for concluding that the trip was a business trip. It should be noted that the administrative law judge found it significant that a nurse at the Shawano Medical Center on February 1, 1996, wrote in a clinic note: "Wife called. Pt. up in Shawano attending trailer." However, the applicant's wife denied that she told the nurse this, credibly indicating that she knew all along that the purpose of the applicant's trip was to visit Aarrow Electric, and that the nurse misunderstood what she told her.

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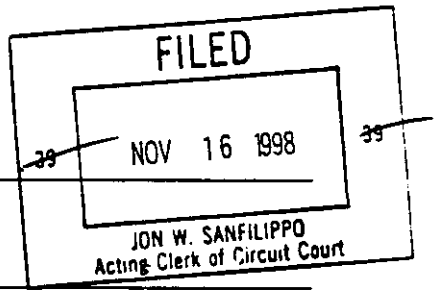
STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY
CIVIL DIVISION

HERITAGE MUTUAL INSURANCE CO.
and LARSEN LABORATORIES, INC.
Petitioners,

-vs- Case No. 98-CV-003116

LABOR AND INDUSTRY REVIEW COMMISSION
and
WILLIAM E. LARSEN
Respondents.



DECISION AND ORDER

The petitioners, Heritage Mutual Insurance Co. ("Heritage") and Larsen Laboratories, Inc. ("Larsen Labs") appeal an interlocutory decision of the respondent Labor and Industry Review Commission ("Commission") reversing the decision of the administrative law judge ("A.L.J.") and awarding respondent William E. Larsen ("Larsen") Worker's Compensation. Pursuant to Wis. Stat. § 102.58, the Commission reduced Larsen's award by fifteen percent.

On August 18, 1997, A.L.J. Ronald J. Ryan issued his decision finding that petitioner Larsen's January 31, 1996, accident did not arise out of his employment thereby concluding he was not entitled to Worker's Compensation benefits. Larsen appealed the decision to the Commission who, on March 31, 1998, issued a decision and memorandum opinion reversing the A.L.J.'s decision. The following facts are taken from the Commission's decision.

Larsen is the President and half owner of Larsen Labs, a small company which performs spectrographic analysis and physical testing of metals. The company is located in Oak Creek, Wisconsin. Although Larsen performed management and operational duties for the company, his primary responsibilities were sales and computer programming. As a part

of his sales' responsibility, Larsen occasionally had to travel.

In 1991, Larsen and his wife, who is the other half owner of the company, purchased forty acres of land in Tigerton, Wisconsin. The Larsens placed a mobile home on the property in 1992. The mobile home served several different purposes. Initially, the mobile home and land was used for recreational purposes. However, beginning in the fall of 1993, Larsen began using the mobile home as a company sales office, in addition to its prior recreational use. Occasionally, Larsen would also reside in the mobile home when he and his wife were not getting along.

On Wednesday January 31, 1996, at approximately 12:30 p.m., Larsen left the company office in Oak Creek to drive to the mobile home in Tigerton. He told his wife he planned to stay in Tigerton overnight and then make a sales call on a prior customer, Aarow Electric, located in nearby Shawno. Larsen also took some paperwork with him to work on while he was in the mobile home. It took Larsen approximately three hours to drive to Tigerton. Upon arriving, Larsen purchased some groceries, liquor, and feed corn to give to the deer. He then went to a tavern where he had four or five drinks of whiskey and diet coke, something he often did after work. Along with the alcohol, Larsen took a couple of Dexatrim diet pills. He then drove directly to the trailer where he intended to fix himself a pizza and work on sales.

However, when Larsen reached the mobile home he was unable to open the door. He had lost his keys to the home while bow hunting the year before and the key he had, a copy of his wife's key, did not work. While attempting to open the door, Larsen experienced dizziness and a slight headache. At this time, the outside temperature was approximately

twenty-five degrees below zero. After unsuccessfully attempting to push and pry open the door, Larsen broke a small, plastic window in the door and reached through it to turn the lock from the inside. Larsen does not remember what happened until he woke up at about 8:45 a.m. the following morning, lying on the floor next to the door. The door and storm door were open about one foot, and Larsen's fingers and toes were frostbitten.

Petitioners appealed the Commission's decision to this court contending that (1) Larsen's was not a "traveling employee" at the time of his injury and even if he was, (2) the injury did not arise out of his employment because (3) he deviated for private or personal purposes at the time of the injury due to his excessive consumption of alcohol. Larsen, in his answer, appealed the Commission's fifteen percent reduction of his award.

STANDARD OF REVIEW

Judicial review of a decision of the Commission is provided in accordance with § 102.23, Wis. Stat. Under Wis. Stat. § 102.23 (1) (e), the Commission's decision may be overturned only if (1) the Commission acted without or in excess of its powers, (2) the order or award was procured by fraud, or (3) the findings of fact made by the Commission do not support the order or award.

This court reviews the Commission's decision and not that of the A.L.J.. *Braun v. Industrial Comm.*, 36 Wis. 2d 48, 56 (1967). The scope of review differs depending on whether the issue being reviewed is a question of fact or a question of law. *United Way of Greater Milwaukee v. DILHR*, 105 Wis. 2d 447, 453 (Ct. App. 1981). As long as the Commission's findings of fact are made in the absence of fraud and supported by credible and substantial evidence, they are conclusive. Wis. Stat. § 102.23 (1)(a). Substantial

evidence is "evidence that is relevant, credible, probative, and of a quantum upon which a reasonable fact finder could base a conclusion." *Cornwell Personnel Assocs. v. LIRC*, 175 Wis. 2d 537, 544 (Ct. App. 1993). The court must also consider conclusive any finding by the commission based upon a reasonable inference from the credible evidence. *Sauerwein v. ILHR Dep't*, 82 Wis. 2d 294, 300-02 (1978). If more than one inference can reasonably be drawn from the evidence, a question of fact is presented. *CBS, Inc. v. LIRC*, No. 96-3707, slip op. at 5 (Wis. June 30, 1998) citing *Vocational, Tech. & Adult Educ. Dist. v. ILHR Dept.*, 76 Wis. 2d 230, 240 (1977).

Statutory interpretation normally presents a question of law which a court reviews using a de nova standard. *See Id.* at 6 (citations omitted). However, the determination of whether the issue presented is one of law or fact is not always easy. In *Nottelson v. ILHR Department*, 94 Wis. 2d 106, 115-17 (1980), the Court stated:

> In many cases we have said that the determination of whether the facts fulfill a particular legal standard is a question of law. . . . Nevertheless, merely labeling the commission's determination as a conclusion of law does not mean that the court should disregard the commission's determination. Determination[s] of ["a deviation for private or personal purposes," or of "acts reasonably necessary for living or incidental thereto,"] call[] for a value judgment, and judicial review of such a value judgment, though a question of law, requires the court to decide in each type of case the extent to which it should substitute its evaluation for that of the administrative agency.

CBS, Inc., No. 96-3707 at 6-7. Although this court is not bound by the legal conclusions and statutory interpretations of the Commission, it must give deference to them. *Sauk County v. WERC*, 165 Wis. 2d 406, 413 (1991). The Supreme Court has determined that great weight deference applies to the Commission's interpretation of Wis. Stat. § 102.03(1)(f). *CBS, Inc.*, No. 96-3707. Therefore, this court will affirm the Commission's

interpretation if it is reasonable. *Id.* at 8 citing *Hagen v LIRC*, 210 Wis. 2d 12, 18 (1997). "An unreasonable interpretation of a statute by an agency is one that 'directly contravenes the words of the statute, is contrary to legislative intent, or is otherwise . . . without rational basis.'" *Id.* quoting *Lisney v. LIRC*, 171 Wis. 2d 499, 506 (1992).

ANALYSIS

I. Traveling Employee

In its decision, the Commission inferred that Larsen's purpose in going to Tigerton on January 31, 1996, was business related. This finding is conclusive as it is based upon a reasonable inference from the credible evidence. Larsen had recently discussed his company's service prices with a representative of Aarow Electric. Although Larsen Labs needed to obtain a technical certification before it could restart business with Aarow Electric, the Commission found Larsen's testimony that his company would not obtain such certification unless it had business from a customer which required it, credible. A reviewing court may not substitute its judgment for that of the agency as to the weight or credibility of the evidence on any finding of fact. *Advance Die Casting Co. v. LIRC*, 154 Wis. 2d 239, 249 (1989). The Commission also found credible Larsen's testimony that he had not been fighting with his wife and that he never hunted at that time of year. Finally, if Larsen had just been concerned about the condition of his trailer, Larsen's neighbor, Mr. Seefeldt, had a key to the trailer and could have easily checked on it. (Mr. Seefeldt plowed the trailer's driveway January 31, 1996, in anticipation of Larsen's arrival.)

II. Reasonably Necessary for Living or Incidental Thereto

Wis. Stat. § 102.02(1)(f) permits compensation to injured traveling employees:

> Every employe whose employment requires the employe to travel shall be deemed to be performing service growing out of and incidental to the employe's employment at all times while on a trip, except when engaged in a deviation for a private or personal purpose. Acts reasonably necessary for living or incidental thereto shall not be regarded as such a deviation. Any accident or disease arising out of a hazard of such service shall be deemed to arise out of the employe's employment.

Section 102.03(1)(f) establishes a presumption that a traveling employee who is injured while on a business trip is performing services growing out of or incidental to his employment throughout the duration of the trip. *See Hansen v. Industrial Commission*, 258 Wis. 623 (1951). The burden of proving a personal deviation on the trip by the employee is upon the party asserting the deviation. *See CBS, Inc.*, No. 96-3707 at 6-7 citing *Lager v. ILHR Dep't*, 50 Wis. 2d 651, 658 (1971). The party asserting the deviation must show not only a deviation but also must show that such deviation was for a personal purpose not reasonably necessary for living or incidental thereto. *Dibble v. DILHR*, 40 Wis. 2d 341, 346 (1968).

The Commission's decision that Heritage did not meet its burden of overcoming this presumption is supported by credible and substantial evidence. The Commission found that, when injured, Larsen "was simply attempting to enter his domicile for the night, an act reasonably necessary for living." Larsen was not injured until after he attempted to shelter himself for the night (an employment activity). If Larsen did, in fact, deviate from acts reasonably necessary for living by stopping at the tavern on the way to the trailer, such deviation had ceased at least by the time Larsen arrived at the trailer. *See Phillips v. ILHR Dept.*, 56 Wis. 2d 569, 579 (1972). (The Commission did not find, as it was unnecessary for them to do so, that Larsen deviated from acts reasonably necessary for living by going to the tavern.)

III. Reduction of Larsen's Award

In its decision, the Commission inferred not only that Larsen was intoxicated but also that the "intoxication was a substantial factor in causing [Larsen's] frostbite injuries, because it is probable that he remained asleep for such an extended period due in part to his intoxication." The Commission's inference that Larsen was intoxicated is conclusive as it is based upon a reasonable inference from the credible evidence. Larsen consumed four or five whiskey and diet cokes in a period of one hour and forty-five minutes. Although Larsen testified he was not intoxicated, the Commission was not bound to accept his testimony as fact. *Massachusetts Bonding & Ins. Co.*, 8 Wis. 2d 606, 610 (1959).

The Commission's inference that Larsen's intoxication caused his frostbite injuries, however, is not conclusive. First, the record does not contain any evidence that a person is more likely to remain asleep if he or she is intoxicated, the Commission just believed it to be probable. Furthermore, the record does not contain any evidence that if Larsen would not have remained asleep for such a long time he would not have received frostbite. At the time Larsen "passed out," the outside temperature was twenty-five degrees below zero. The Commission did not make a finding that Larsen's drinking contributed to his passing out and this Court has no authority to make such a finding on its own. *RT Madden , Inc. v. DILHR*, 43 Wis. 2d 528, 536 (1969).

CONCLUSION

THEREFORE, IT IS HEREBY ORDERED that the decision of the Labor and Industry Review Commission awarding petitioner worker's compensation benefits is affirmed but the Commission's reduction of that award is reversed and the cause remanded for proceedings consistent with this decision.

Dated at Milwaukee, Wisconsin, this 16 day of November, 1998.

BY THE COURT:

Honorable Michael Malmstadt
Circuit Court Judge
Branch 39

COURT OF APPEALS
DECISION
DATED AND FILED

March 14, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 98-3577

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

HERITAGE MUTUAL INSURANCE COMPANY AND LARSEN LABORATORIES, INC.,

PLAINTIFFS-APPELLANTS,

V.

WILLIAM E. LARSEN AND LABOR AND INDUSTRY REVIEW COMMISSION,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: MICHAEL G. MALMSTADT, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Heritage Mutual Insurance Company appeals from a final order of the circuit court, which confirmed the Labor and Industry Review Commission's (LIRC) determination that William E. Larsen sustained a

compensable injury. Heritage also appeals the trial court's decision to reverse LIRC's determination that the award should be reduced by 15%.

¶2 Heritage claims that LIRC's decision was not reasonable given the evidence in the record. Because LIRC could reasonably conclude that Larsen sustained a compensable accidental injury in the course of his employment, we affirm.

I. BACKGROUND

¶3 This appeal concerns the application of WIS. STAT. § 102.03(1)(f) (1997-98)[1] commonly referred to as the "traveling employee statute."[2] The basic facts in this appeal are not in dispute; the inferences drawn from the facts, however, are in dispute. We relate them in abbreviated form.

¶4 At the time that Larsen was injured, he and his wife jointly owned Larsen Laboratories, Inc. The company was engaged in the metal analysis business primarily for foundries. Among his other duties, Larsen was in charge of sales for the services provided by the company. Routinely, Larsen would contact customers by telephone and follow up, if necessary, with a personal visit to close a sale. This practice applied not only to current customers, but also to potential

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[1] All references to the Wisconsin Statutes will be to the 1997-98 version unless otherwise noted.

[2] WISCONSIN STAT. § 102.03(1)(f) provides:

> Every employe whose employment requires the employe to travel shall be deemed to be performing service growing out of and incidental to the employe's employment at all times while on a trip, except when engaged in a deviation for a private or personal purpose. Acts reasonably necessary for living or incidental thereto shall not be regarded as such a deviation. Any accident or disease arising out of a hazard of such service shall be deemed to arise out of the employe's employment.

customers. On the date of the injury, January 31, 1996, Larsen and his wife owned a forty-acre tract of land near Tigerton, Wisconsin. They kept a mobile home on this lot, which was used for both recreational and business purposes.

¶5 On January 31st, Larsen left his company office in Oak Creek, Wisconsin, at approximately 12:30 p.m., with the intention of driving to the mobile home, staying overnight, and then, on the following day, calling upon a former customer, Aarow Electric, located in nearby Shawano, Wisconsin. Before Larsen left, he called his neighbor, Wally Seefeldt, and asked him to plough his driveway entrance. He took along some company paper work. The drive to Tigerton took approximately three hours. At approximately 3:30 p.m., Larsen arrived in Tigerton. He purchased some groceries at a Red Owl food store, purchased some shelled corn at the Tigerton Feed Mill to feed the wild life, and then stopped at the Split Rock tavern to relax. While there, Larsen consumed four or five mixed drinks, which was his normal daily practice. He arrived at the tavern at about 4:15 p.m. and left around 6:15 p.m. He then drove directly to the mobile home located three and one-half miles away. His intention was to prepare a pizza and then do some business paperwork. The temperature was approximately twenty-five degrees below zero.

¶6 On that same day, Larsen had started a diet, and had taken two Dexatrim pills: one in the morning and one at noon. Although Seefeldt had ploughed the mobile home's driveway, there remained about five inches of snow on the sidewalk and steps to the entrance of the mobile home. Initially, because of the accumulation of snow, Larsen had difficulty opening the outer storm door. He was unable to unlock the inner door with a new key he recently had made. In his efforts to open the door, he began to feel dizzy. His dizzy condition was such that he became concerned that he might fall down. Larsen hit the door with a shovel,

but it would not open. Finally, he broke a plastic window which allowed him to reach in and open the door from the inside and push it open. The last thing Larsen remembers was being half in and half out of the doorway entrance. The following morning he woke up about 8:45 a.m., and found himself on the floor just inside the inner door. Both doors were partially open. It was cold and both his hands and feet hurt. Soon he received a telephone call from his wife and, shortly thereafter, his neighbors, the Seefeldts, showed up at his door. After some discussion and reluctance, Larsen allowed the Seefeldts to take him to the Shawano Medical Center. As a result of this incident, all of his fingers and most of each thumb had to be amputated because of frostbite.

¶7 Larsen filed a worker's compensation claim for indemnity and expenses. An administrative law judge found that although Larsen was engaged in a business trip at the time of his injuries, he nevertheless had entered a zone of danger not created by the condition of employment, but rather a personal deviation, which did not entitle him to benefits. Larsen appealed to LIRC.

¶8 LIRC overruled the ALJ decision and found that the evidence led to the inference that Larsen's purpose in going to Tigerton on the date of the accident was business-related. It concluded that the zone of special danger; i.e., exposure to cold weather, was occasioned by reason of employment activity. LIRC further found that Larsen was intoxicated and that this condition was a substantial factor in causing his injuries. Pursuant to WIS. STAT. § 102.58, it reduced Larsen's indemnity benefits by 15%.

¶9 Heritage petitioned for a review of LIRC's decision in circuit court. The circuit court affirmed LIRC's decision awarding Larsen benefits, but reversed

its decision to reduce the benefits by 15%. Heritage now appeals the award of benefits; Larsen argues that LIRC's 15% reduction of his award was unwarranted.

II. ANALYSIS

¶10 In reviewing a determination of LIRC, this court's scope of review, both as to facts and the law, is the same as that of the circuit court. *See* ***C.W. Transport, Inc. v. LIRC***, 128 Wis. 2d 520, 525, 383 N.W.2d 921 (Ct. App. 1986). The validity of the circuit court decision is not at issue, because the task of this court is merely to determine whether LIRC's decision was correct. *See* ***Langhus v. LIRC***, 206 Wis. 2d 494, 501, 557 N.W.2d 450 (Ct. App. 1996).

¶11 Deciding whether or not an employee is acting within the course of his or her employment under the Worker's Compensation Act is a mixed question of fact and law for LIRC to decide. *See* ***Ide v. LIRC***, 224 Wis. 2d 159, 164, 589 N.W.2d 363 (1999). The conduct of the employee that is placed in issue requires a finding of fact, and the application of the relevant statute to the conduct presents a question of law. *See* ***id.*** at 164-65.

¶12 When we are presented with a mixed question of fact and law in an administrative review, we employ the standard of review set forth in ***Michels Pipeline Construction, Inc. v. LIRC***, 197 Wis. 2d 927, 541 N.W.2d 241 (Ct. App. 1995):

> LIRC's findings of fact are conclusive on appeal so long as they are supported by credible and substantial evidence. The drawing of one of several reasonable inferences from undisputed facts also constitutes fact finding. Any legal conclusion drawn by LIRC from its findings of fact, however, is a question of law subject to independent judicial review.

Id. at 931 (citation omitted).

¶13 For questions of law, we generally apply one of three levels of deference to the agency's conclusion: "great weight," "due weight," or no deference. For agency findings of fact, we apply the "substantial evidence" standard. *See* ***Sea View Estates Beach Club, Inc. v DNR***, 223 Wis. 2d 138, 148, 588 N.W.2d. 667 (Ct. App. 1998). "Where great deference is appropriate, the agency's interpretation will be sustained if it is reasonable—even if an alternative reading of the statute is more reasonable." ***Barron Elec. Coop. v. Public Serv. Comm'n***, 212 Wis. 2d 752, 761, 569 N.W.2d 726 (Ct. App. 1997). We will also defer to an agency's interpretation "'if it is intertwined with value and policy determinations'" inherent in the agency's decision-making function. *See* ***id.***

¶14 For findings of fact,

> The question is not whether there is evidence to support a finding that was not made, but whether there was evidence to support a finding that was, in fact, made by the commission. We thus need not consider whether there was credible evidence that would have supported a contrary inference or conclusion.

Brickson v. DILHR, 40 Wis. 2d 694, 699, 162 N.W.2d 600 (1968).

¶15 We conclude that it is proper to apply the great weight deference to LIRC's interpretation of WIS. STAT. § 102.03(1)(f) in this case based upon the application of the four-factor test as enunciated in ***CBS, Inc. v. LIRC***, 219 Wis. 2d 564, 572-73, 579 N.W.2d 668 (1998). That being the posture of our analysis, we shall affirm LIRC's interpretation of WIS. STAT. § 102.03(1)(f) if it is reasonable; i.e., has a rational basis. *See* ***id.*** at 573.

¶16 Heritage proffers several bases for contending that LIRC erred. It first asserts that there is no support in the evidence for LIRC's finding that Larsen's purpose in going to Tigerton on January 31, 1996, was business-related.

Relying on ***Pressed Steel Tank Co. v. Industrial Comm'n***, 255 Wis. 333, 335, 38 N.W.2d 354 (1949), Heritage argues that this determination ought to be rejected as based upon assumed facts which were nonexistent. This assertion is based upon a year-old letter dated January 25, 1995, whereby Larsen requests the opportunity to bid on testing work for Aarow Electric of Shawano, Wisconsin. Heritage argues that this stale letter cannot be a reasonable basis to conclude that Larsen's trip was business-related. If that were the only evidence in the record relating to the drive to Tigerton, Heritage would win the day. But, it was not.

¶17 Aarow had been a customer of Larsen's and he wanted to re-acquire its business. It is uncontroverted that Larsen either called or visited Aarow every six months to a year in his effort to acquire Aarow as a customer. He needed to obtain a technical certification before he could restart business with Aarow; yet, the only way this could be achieved was to obtain an order from a customer that required certification. LIRC found this stratagem credible. In addition, LIRC, noting the severity of the weather, the length of the drive, that the neighbor Seefeldt had a key to the mobile home, that Larsen had, in fact, spoken to Seefeldt that morning to plough his driveway, and that he never hunted that time of year, inferred that the purpose of the trip was business-related.[3] We cannot conclude that LIRC's credibility-based findings and inferences drawn therefrom were unreasonable.

¶18 The second basis for Heritage's appeal is its disagreement with LIRC's conclusion that it failed to meet its burden to rebut the statutory

[3] There is also a suggestion in the record that, because of Larsen's less than tranquil married life, he drove to Tigerton because he was feuding with his wife. LIRC accorded this suggestion little weight.

presumption created in WIS. STAT. § 102.03(1)(f). The statute creates a presumption that a traveling employee performs services incidental to his employment at all times on a business trip until he returns from the trip. *See* ***CBS, Inc.***, 219 Wis. 2d at 578-79. To rebut the presumption, two requirements must be established: (1) a deviation by the employee from the business trip; and (2) such deviation must be for a personal purpose not reasonably necessary for living or incidental thereto. *See* ***Hunter v. DILHR***, 64 Wis. 2d 97, 101-02, 218 N.W.2d 314 (1974). A determination of a deviation for private or personal purposes or of acts reasonably necessary for living or incidental thereto are questions of law. Nevertheless, these determinations call for a value judgment requiring a determination as to what extent we should substitute our evaluation for that of the administrative agency. *See* ***Nottelson v. DILHR***, 94 Wis. 2d 106, 115-17, 287 N.W.2d 763 (1980). When the expertise of the administrative agency is significant to the determination of the legal question, the agency's decision, although not controlling, should be given weight and, in this case, great deference. *See* ***CBS, Inc.***, 219 Wis. 2d at 572-73. Thus, we shall affirm LIRC's interpretation of WIS. STAT. § 102.03(1)(f) if it is reasonable. *See* ***CBS, Inc.***, 219 Wis. 2d at 573.

¶19 Heritage contends that LIRC's failure to find a deviation on Larsen's part is not "reasonable" because substantial evidence suggests that Larsen deviated from the course and scope of his employment activities by consuming unreasonably large quantities of alcohol before arriving at his mobile home. In succinct terms, Heritage argues that the evidence provides a clear rebuttal of the statutory presumption. We are not convinced.

¶20 The burden of proving a personal deviation by an employee on a trip is upon the party asserting the deviation. *See* ***id.*** at 579. Our supreme court has

declared "that the effect to be given the presumption was primarily for [LIRC] to determine and that [an appellate court] would review [LIRC's] determination under the limited circumstances provided in the 'any credible evidence' test." ***Goranson v. DILHR***, 94 Wis. 2d 537, 552, 289 N.W.2d 270 (1980). Our task is only to decide whether LIRC properly concluded that the evidence relied upon by Heritage was insufficient to rebut the presumption.

¶21 LIRC found that, even if Larsen had deviated from acts reasonably necessary for living by going to the tavern, the deviation had ceased by the time he arrived at the mobile home. It opined that the determinative fact was that Larsen was performing acts reasonably necessary to living when his injury occurred. *See* ***CBS, Inc.***, 219 Wis. 2d at 577. Larsen was trying to enter his domicile for the night when he was injured. LIRC's conclusion that Heritage did not meet its burden of overcoming the presumption is supported by credible evidence.

¶22 Next, Heritage asserts that our supreme court's decisions in ***Sauerwein v. DILHR***, 82 Wis. 2d 294, 262 N.W.2d 126 (1978), ***Hunter v. DILHR***, 64 Wis. 2d 97, 218 N.W.2d 314 (1974), ***Dibble v. DILHR***, 40 Wis. 2d 341, 161 N.W.2d 913 (1968), ***Tyrrell v. Industrial Comm'n***, 27 Wis. 2d 219, 133 N.W.2d 810 (1965), and ***Simons v. Industrial Comm'n***, 262 Wis. 454, 55 N.W.2d 358 (1952), all require reversal as a matter of law. We disagree for a very fundamental reason. The determined facts in each of these decisions are so different from the facts of this case that we give no weight to their citation as authority to reverse.

¶23 Last, Heritage contends that LIRC erroneously applied the "positional risk analysis" when it concluded that Larsen's injury arose out of

employment under WIS. STAT. § 102.03(1). For the doctrine of "positional risk analysis" to apply:

> "...'all that is required is that the "obligations or conditions" of employment create the "zone of special danger" out of which the injury arose.' In other words, there is a causal connection between the employment and the injury where the employee is obligated by his employment to be present at the place where he encounters injury through the instrumentality of a third person or an outside force. Such cases include, among others, accidents arising from horseplay, weather conditions, and assaults."

American Motors Corp. v. Industrial Comm'n, 1 Wis. 2d 261, 273, 83 N.W.2d 714 (1957) (citations omitted).

¶24 In applying this doctrine, LIRC explained: "Utilizing the positional risk analysis, the zone of special danger to which the applicant was exposed was the extremely cold weather in Tigerton that night, and it was by reason of an employment activity (sheltering himself for the night) that the applicant was exposed to this special danger."

¶25 In response, Heritage cites ***Goranson***, where our supreme court upheld a denial of worker's compensation benefits where the dispute was whether the accident arose out of the driver's employment. *See **id.***, 94 Wis. 2d at 555. Heritage relies upon the following language from ***Goranson***: "An employee may wilfully do a wrongful act for purposes entirely foreign to his employment, and while so acting take himself without the scope of his employment.... Such a departure ... measured in terms of time and space, may be very slight." ***Id.*** (citations omitted).

¶26 In ***Goranson***, the applicant, a charter bus driver, was injured after he drove a group of people to Green Bay. *See **id.*** at 541-42. In Green Bay, the driver

checked into a hotel along with his passengers. *See id.* Later in the evening, he leaped from his third floor room onto the roof of another section of the hotel two floors below, sustaining a broken hip and other injuries. *See id.* There was evidence that he had been drinking throughout the evening with a woman and that he quarreled with her just before jumping. *See id.* at 556. Our supreme court declared, "The situation in which Mr. Goranson found himself was not one which was created by the risk of staying at the hotel." *Id.* at 557. By analogy, Heritage argues that the situation in which Larsen found himself—passed out cold on a rapidly cooling mobile home floor—was not created by the risk of going to Tigerton on a cold January day. A subsequent explication of ***Goranson***, however, causes Heritage's analogy to limp.

¶27 In ***Weiss v. City of Milwaukee***, 208 Wis. 2d 95, 559 N.W.2d 588 (1997), the supreme court had occasion to refine ***Goranson***. It stated:

> [T]he [***Goranson***] court determined that the accident did not arise out of the driver's employment, because the injuring force was purely personal to him.
>
> The facts of this case are distinguishable from those in ***Goranson***. In ***Goranson***, the bus driver's employment did not contribute to or facilitate the accident causing the injury he suffered jumping from the hotel window.

Id. at 108 (citation omitted).

¶28 Here, LIRC found that Larsen "[w]hen injured ... was simply attempting to enter his domicile for the night, an act reasonably necessary for living." Based on the record evidence, this was not an unreasonable finding and fulfills the requirement of WIS. STAT. § 102.03(1)(f). Unlike Goranson, Larsen's plan to stay overnight in his mobile home in order to conduct business the following day, provided the occasion for the accident which caused the injury he suffered. Furthermore, there was no direct evidence that the "injuring force was

purely personal to him." Larsen did not suffer any injury until after he sought shelter for himself for the evening, an activity, that under the circumstances, was incidental to employment. Due to the nature of the evidence in the record and the lack of evidence to the contrary, it was not unreasonable for LIRC to infer that the business circumstances of Larsen's trip to Tigerton on January 31, 1996, caused him to be in the zone of special danger, whereby he was exposed to sub-zero temperatures.

¶29 The last issue is whether there is credible evidence in the record to support LIRC's finding that Larsen's intoxication was a substantial factor in causing his frostbite injuries. The employer bears the burden of proof to establish the fact of intoxication and that the injury was caused in part by intoxication to sustain a 15% reduction in compensation benefits under WIS. STAT. § 102.58. *See* ***Haller Beverage Corp. v. DIHLR***, 49 Wis. 2d 233, 237, 181 N.W.2d 418 (1970).

¶30 Larsen drank four or five mixed drinks within one hour and forty-five minutes, just before he drove to his mobile home. Because it was customary for him to engage in such a habit, Larsen claimed he was not intoxicated. Contrary to Larsen's assertion, the record contains three medical reports supporting the conclusion that he passed out because of ethanol abuse. We conclude there is support in the record for LIRC's finding that Larsen was intoxicated. The question of the causal link between intoxication and the injury, however, is quite another issue.

¶31 LIRC inferred that Larsen's "intoxication was a substantial factor in causing" his frostbite injuries, "because it is probable that he remained asleep for such an extended period due in part to his intoxication." The inferred determination of the existence of a substantial factor is a fact-finding process. Just

as we can assume that the trial court determined a fact in a manner that supports the trial court's ultimate fact determination, *see* ***Sohns v. Jensen***, 11 Wis. 2d 449, 453, 105 N.W.2d 818 (1960), so can we engage in the same process in reviewing the determinations of LIRC. But, we can only make that assumption when the evidence exists in the record to support the "assumed fact." If the record does not support the "assumed fact" then the finding of the "assumed fact" is clearly erroneous and cannot be sustained.

¶32 The trial court explicated:

> [T]he record does not contain any evidence that a person is more likely to remain asleep if he or she is intoxicated, the Commission just believed it to be probable. Furthermore, the record does not contain any evidence that if Larsen would not have remained asleep for such a long time he would not have received frostbite. At the time Larsen "passed out," the outside temperature was twenty-five degrees below zero. The Commission did not make a finding that Larsen's drinking contributed to his passing out.

There is no evidence how the consumption of alcohol may affect sleeping patterns. Of further note is Larsen's habit of regularly indulging in four or five of the same type of drinks after work without ever having passed out. LIRC did not discount this testimony. We adopt the trial court's analysis and decision, including the trial court's decision to overturn the reduction made by LIRC.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

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You are hereby notified that the Court has entered the following order:

No. 98-3577 Heritage Mut. Ins. Co., et al. v. Larsen, et al.

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of plaintiffs-appellants-petitioners, Heritage Mutual Insurance Company and Larsen Laboratories, Inc., and considered by the court,

IT IS ORDERED that the petition for review is granted; that pursuant to Wis. Stat. § (Rule) 809.62, within 30 days after the date of this order the plaintiffs-appellants-petitioners must file a brief in this court; that within 20 days thereafter the defendants-respondents, William E. Larsen and Labor and Industry Review Commission, must file either a brief or a statement that no brief will be filed; and that if a brief is filed by the defendants-respondents, within 10 days thereafter the plaintiffs-appellants-petitioners must file either a reply brief or a statement that no reply brief will be filed; and

IT IS FURTHER ORDERED that in any brief filed in this court the parties shall not incorporate by reference any portion of their court of appeals' brief or petition for review or response; instead, any material in these documents upon which there is reliance should be restated in the brief filed in this court; and

IT IS FURTHER ORDERED that the first brief filed in this court must contain, as part of the appendix, a copy of the decision of the court of appeals in this case; and

IT IS FURTHER ORDERED that within 30 days after the date of this order, each party must provide the clerk of this court with ten copies of the brief previously filed on behalf of that party in the court of appeals; and

IT IS FURTHER ORDERED that the allowance of costs, if any, in connection with the granting of the petition will abide the decision of this court on review.

Cornelia G. Clark
Clerk of Supreme Court

STATE OF WISCONSIN

IN SUPREME COURT

No. 98-3577

HERITAGE MUTUAL INSURANCE
COMPANY and LARSEN
LABORATORIES, INC.,
Plaintiffs-Appellants-Petitioners,

v.

WILLIAM E. LARSEN and
LABOR AND INDUSTRY
REVIEW COMMISSION,
Defendants-Respondents.

REVIEW OF A DECISION
OF THE COURT OF APPEALS,
DISTRICT I, AFFIRMING A FINAL ORDER
OF CIRCUIT COURT FOR MILWAUKEE COUNTY, THE
HONORABLE MICHAEL MALMSTADT,
CIRCUIT JUDGE, PRESIDING

BRIEF OF DEFENDANT-RESPONDENT, LABOR AND INDUSTRY REVIEW COMMISSION

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No. 98-3577

HERITAGE MUTUAL
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LARSEN LABORATORIES, INC.,

Plaintiffs-Appellants-Petitioners,

v.

WILLIAM E. LARSEN and
LABOR AND INDUSTRY
REVIEW COMMISSION,

Defendants-Respondent.

REVIEW OF A DECISION
OF THE COURT OF APPEALS, DISTRICT 1,
AFFIRMING A FINAL ORDER OF CIRCUIT COURT
FOR MILWAUKEE COUNTY,
THE HONORABLE MICHAEL MALMSTADT,
CIRCUIT JUDGE, PRESIDING

BRIEF OF DEFENDANT-RESPONDENT, LABOR AND INDUSTRY REVIEW COMMISSION

ISSUE PRESENTED

Could the Commission reasonably conclude that William E. Larsen (hereafter Larsen) sustained a compensable accidental injury in the course of his employment on January 31, 1996?

The court of appeals answered in the affirmative.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Commission believes that both oral argument and publication are warranted. The Commission believes that the opinion should be published in the official reports because the decision of this court will necessarily reaffirm the proposition that intoxication is not synonymous with personal deviation as a matter of law, *see Phillips v. ILHR Department*, 56 Wis. 2d 569, 579, 202 N.W.2d 249 (1972), and, therefore, the opinion will decide a case of substantial and continuing public interest under Wis. Stat. § 102.03(1)(f).

STATEMENT OF THE CASE

In this case under § 102.03(1)(f), the "traveling employe's" statute, the Commission made its award of worker's compensation based upon these pertinent findings of fact and conclusions of law (record references added):

The applicant, whose birthdate is July 16, 1941, is president and half owner of the employer, a small company which performs spectrographic analysis and physical testing of metals (R.6: 14, 15-16, 17-18, 333). The company is located in Oak Creek, Wisconsin, and the applicant and his wife, who is the other half owner of the company, reside in Cudahy (R.6: 13, 14, 18, 22-23, 52, 141). The applicant performed management and operational duties for the business, but his primary responsibilities were sales and computer programming (R.6: 14, 16, 17, 18, 141-42). The company's customers are far flung so the applicant occasionally traveled, not only to see current customers but to solicit new ones (R.6: 19-22, 45-46).

In 1991, the applicant and his wife purchased forty acres of land near Tigerton, Wisconsin, and placed a mobile home on the land in 1992 (R.6: 24, 40, 61, 118, 132, 142). Initially, the applicant used the land and mobile home solely

for recreational purposes, as he is an avid hunter (R.6: 24, 27-28, 61-62, 64, 117, 142). However, in the fall of 1993, the applicant began using the mobile home as a company sales office, in addition to its recreational use (R.6: 24-25, 27, 60, 62, 65, 67, 71, 142, 300). The applicant would use the trailer as a base from which to make sales calls, and also a quiet place to perform paperwork related to the business (R.6: 24-25, 26-27, 46-47, 60, 64-65, 143). The applicant also used the trailer as an occasional residence, when he and his wife were not getting along (R.6: 86-88, 163). He and his wife were divorced in 1983 and remarried in 1984 (R.6: 141).

On Wednesday, January 31, 1996, at approximately 12:30 p.m., the applicant left the company office in Oak Creek to drive to the trailer in Tigerton (R.6: 23-24, 29-30, 92). He told his wife he planned to stay overnight there and then make a sales call on a prior customer, Aarrow Electric, located nearby in Shawano (R.6: 23, 34, 42, 83, 143-44). He also took some company paperwork with him, and planned to work on it in the trailer (R.6: 25, 100, 117, 149-50). It took him approximately three hours to drive to Tigerton (R.6: 29-30, 92, 323). There he first bought some groceries, liquor, and feed corn to give to the deer, and then went to a tavern (R.6: 29-31, 92-95, 322-23). He had four or five drinks of whiskey and diet coke, something he did after work four or five nights per week (R.6: 31-32, 33, 96, 98, 100, 102, 121-22, 148-49). He had also taken a couple of Dexatrim diet pills (R.6: 33-34, 93). He then drove directly to the trailer where he intended to fix a pizza and work on sales (R.6: 33-34, 100).

It was approximately 25 degrees below zero when the applicant reached the trailer (R.6: 35, 73, 322). He was unable to open the trailer door, because the key he was using was a copy made from his wife's keys (R.6: 36-37, 322). He had lost his keys while bow hunting the previous December (R.6: 37, 322). He also found himself feeling dizzy and suffering from a slight headache (R.6: 37-38, 322). After unsuccessfully attempting to push and pry the door open, he broke a small, plastic window in the door and

reached through it to turn the lock from the inside (R.6: 38-39, 322). The applicant does not recall what happened next, until he woke up at about 8:45 a.m. the following morning, lying on the floor next to the door (R.6: 38-39, 322). The door and storm door were open about one foot, and the applicant's fingers and toes were frostbitten (R.6: 39, 41, 322).

The applicant's wife had been attempting to telephone him, and finally got him to answer the phone when he woke up (R.6: 40-41, 145-47). She knew he did not sound well when she talked to him, so she telephoned a neighbor, Wally Seefeldt, and asked him to go over and check on the applicant (R.6: 133-34, 146-47). Seefeldt and his wife found the applicant awake (R.6: 40-41, 134). They made coffee for him and talked to him in the kitchen of the trailer (R.6: 41, 134). At that time, the applicant told Seefeldt he had come up to Tigerton to go to Aarrow Electric (R.6: 84-85, 136, 138). The Seefeldts took the applicant to the hospital, and ultimately all the applicant's fingers and most of each thumb were amputated due to the frostbite which caused gangrene (R.6: 41-42, 50, 75, 148, 180-88, 193-240).

The credible evidence leads to the inference that the applicant's purpose in going to Tigerton on January 31, 1996, was business related (R.6: 73, 80, 110, 116). The applicant had recently discussed his company's service prices with a representative of Aarrow Electric, as verified by the applicant's testimony and a copy of a letter from him to Aarrow Electric dated January 26, 1996 [*sic*][1] (R.6: 44-45, 59, 151, 301). The applicant's company needed to obtain a technical certification before it could restart business with Aarrow Electric, but the applicant credibly testified that his company would not obtain such certification unless it had business from a customer which required it (R.6: 42-43, 58-59, 70). Furthermore, the commission infers that it is unlikely that absent a business purpose, the applicant would have driven the significant

[1] This is a typographical error; the correct year is 1995.

distance to Tigerton at that time of year and in such severe weather. The applicant credibly testified that he had not been fighting with his wife and that he never hunted at that time of year (R.6: 28, 79, 89-90, 121, 127). Had he been concerned about the condition of his trailer, Mr. Seefeldt was a phone call away, and testified that he had a key to the trailer (R.6: 132-33, 136-37). In fact, the applicant telephoned Mr. Seefeldt the morning of January 31, 1996, and asked him to plow out the driveway to the trailer, in anticipation of his arrival (R.6: 35, 132-33, 135).

Accordingly, on January 31, 1996, the applicant was a traveling employe pursuant to Wis. Stat. § 102.03(1)(f). That statute provides that every traveling employe is covered for worker's compensation purposes at all times while on a trip, including all acts reasonably necessary for living or incidental thereto, except when engaged in a deviation for a private or personal purpose. When injured, the applicant was simply attempting to enter his domicile for the night, an act reasonably necessary for living (R.6: 38-39, 322). Utilizing the positional risk analysis, the zone of special danger to which the applicant was exposed was the extremely cold weather in Tigerton that night, and it was by reason of an employment activity (sheltering himself for the night) that the applicant was exposed to this special danger.

The fact that the applicant had a number of drinks prior to returning to the trailer does not defeat his claim under Ch. 102. Regardless of any personal opinions one might have about the applicant's drinking habits, the fact is that he routinely drank as much as he did the evening of January 31, 1996, and when the accident and injury occurred the applicant was in the process of entering the trailer (R.6: 32, 33, 38-39, 98, 100, 102, 121-22, 148-49, 322). Even were it to be found that the applicant had deviated from acts reasonably necessary for living by going to the tavern, a finding which the commission does not make, it would have to be found that the deviation had ceased by the time the applicant arrived at the trailer. As

was stated in **Lager v. ILHR Dept.**, 50 Wis. 2d 651, 185 N.W.2d 300 (1971):

> "It is clear, as a matter of law, that, in the event a salesman commences travel in the course of his employment and subsequently deviates from that employment but later resumes his route which he would have to follow in the pursuance of his employer's business, the deviation has ceased and he is performing services incidental to and growing out of his employment." **Id.** at 661.

While the applicant's drinking may or may not have contributed to his syncopal episode, even assuming that it did, intoxication alone does not defeat a worker's compensation claim but only decreases the benefits. **Phillips v. ILHR Dept.**, 56 Wis. 2d 569, 579, 202 N.W.2d 249 (1972); **Dibble v. ILHR Dept.**, 40 Wis. 2d 341, 350, 161 N.W.2d 913 (1968). The determinative fact in this traveling employe case is the fact that the applicant was performing acts reasonably necessary to living when his injury occurred.

The commission infers from the applicant's testimony concerning how much he drank at the tavern on January 31, 1996, that he was intoxicated. It additionally infers that this intoxication was a substantial factor in causing the applicant's frostbite injuries, because it is probable that he remained asleep for such an extended period due in part to his intoxication. Therefore, pursuant to Wis. Stat. § 102.58, all temporary disability and permanent disability awarded to the applicant will be reduced by 15 percent.

Although the respondents did not submit arguments to the commission concerning the 30-day notice issue under Wis. Stat. § 102.12, this issue was raised in the answer to the application. The commission finds that the circumstances of this injury were unusual enough that it is credible and reasonable that the applicant did not immediately understand that his injury was related to his employment. Regardless, there has been no showing that

the employer was misled by the applicant's failure to give notice within 30 days of the injury.

The applicant's conceded average weekly wage is $576.92, which translates into a weekly temporary total disability rate of $384.62. The 15 percent reduction brings the temporary total disability rate to $326.93 per week. The medical opinions demonstrate temporary total disability from February 1, 1996 to the date the hearing was held on May 21, 1997, a period of exactly 68 weeks. Temporary total disability up to the date of hearing therefore amounts to $22,231.24, less $3,461.58 previously paid, for a net amount due of $18,769.66. A 20 percent attorney's fee will be subtracted from this award.

The applicant has also incurred reasonably required medical expenses as enumerated in Applicant's Exhibit E, requiring reimbursement of $44,809.33 to the nonindustrial insurance carrier, Family Health Plan, and $612.00 to Curative Rehabilitation Services.

Dr. Watchmaker's opinion leads to the credible inference that as of the hearing date, it was too early to assess permanent disability, and that the order should be left interlocutory with respect to additional disability and medical care.

The Commission wrote the following memorandum opinion:

The only issue of witness credibility entering into the commission's decision was the factual issue of what reason(s) the applicant had for traveling to his trailer in Tigerton on January 31, 1996. In consultation with the commission, the administrative law judge indicated that he was not entirely certain why the applicant took the trip, although he believed that it was probably taken both to check on the trailer and to call on Aarrow Electric.

The above findings detail the commission's reasons for concluding that the trip was a business trip. It should be

noted that the administrative law judge found it significant that a nurse at the Shawano Medical Center on February 1, 1996, wrote a clinic note: "Wife called. Pt. up in Shawano attending trailer." However, the applicant's wife denied that she told the nurse this, credibly indicating that she knew all along that the purpose of the applicant's trip was to visit Aarrow Electric, and that the nurse misunderstood what she told her.

Heritage brought an appeal pursuant to Wis. Stat. § 102.25(1) to reverse the final order of the circuit court, which confirmed the Commission's determination that Larsen sustained a compensable injury on January 31, 1996, but set aside that portion of the Commission decision which ordered 15 percent decreased compensation under Wis. Stat. § 102.58.[2] In its unpublished opinion dated March 14, 2000, the court of appeals affirmed the final order of the circuit court.

STATUTE INVOLVED

Wis. Stat. § 102.03(1)(f), provides as follows:

> Every employe whose employment requires him to travel shall be deemed to be performing service growing out of an incidental to the employe's employment at all times while on a trip, except when engaged in a deviation for a private or personal purpose. Acts reasonable necessary for living or incidental thereto shall not be regarded as such a deviation. Any accident or disease arising out of a hazard of such service shall be deemed to arise out of the employe's employment.

[2] The Commission acquiesced in the circuit court's decision on the decreased compensation issue here and, therefore, asked on appeal that the final order of the circuit court be affirmed in its entirety. The Commission will not brief this issue any further and relies on the analysis used by the circuit court and the court of appeals.

ARGUMENT

THE COMMISSION COULD REASONABLY CONCLUDE THAT LARSEN SUSTAINED A COMPENSABLE ACCIDENTAL INJURY IN THE COURSE OF HIS EMPLOYMENT ON JANUARY 31, 1996.

A. A mixed question of fact and law was presented to the Commission.

Deciding whether or not an employe is acting within the course of his or her employment under the compensation act is a mixed question of fact and law for the Commission to determine. *See Wisconsin Elec. Power Co. v. LIRC*, 226 Wis. 2d 778, 786-87, 595 N.W.2d 23 (1999); *Ide v. LIRC*, 224 Wis. 2d 159, 164, 589 N.W.2d 363 (1999); *CBS, Inc. v. LIRC*, 219 Wis. 2d 564, 570-73, 579 N.W.2d 668 (1998); *Applied Plastics, Inc. v. LIRC*, 121 Wis. 2d 271, 276, 359 N.W.2d 168 (Ct. App. 1984). Simply stated, the conduct of the employe which is at issue presents questions of fact and the application of the pertinent statute to that conduct presents a question of law. *Id.* at 276.

When presented with a mixed question of fact and law on administrative review, this court employs the standard of review set forth as follows in *Wisconsin Elec. Power Co.*, 226 Wis. 2d at 786-87:

> Factual findings of LIRC are conclusive as long as they are supported by credible and substantial evidence and LIRC did not act fraudulently or in a manner which exceeds its powers. *See* § 102.23(1)(a); *CBS, Inc. v. LIRC*, 219 Wis. 2d 564, 571, 579 N.W.2d 668 (1998). A court may overturn a decision made by LIRC if it was fraudulently obtained or made while LIRC was acting outside the scope of its powers. § 102.23(1)(e). A LIRC order or award may also be

> set aside if it is unsupported by LIRC's findings of fact, § 102.23(1)(e), or depends upon "any material and controverted finding of fact that is not supported by credible and substantial evidence." § 102.23(6). However, "the court shall not substitute its judgment for that of the commission as to the weight or credibility of the evidence on any finding of fact." § 102.23(6).
>
> The application of Wis. Stat. § 102.03(1)(f) to the facts as found by LIRC presents a question of law which this court reviews under the great weight deference standard. *CBS*, 219 Wis. 2d at 573-74. The great weight deference standard requires that we uphold LIRC's interpretation of the statute unless it is unreasonable. *Id.* at 574. *See Ide v. LIRC*, 224 Wis. 2d 159, 167, 589 N.W.2d 363 (1999). "An unreasonable interpretation of a statute by an agency is one that 'directly contravenes the words of the statute, is clearly contrary to legislative intent, or is otherwise. . . without rational basis.'" *CBS*, 219 Wis. 2d at 574 (quoting *Hagen v. LIRC*, 210 Wis. 2d 12, 20, 563 N.W.2d 454 (1997)).

Thus, in examining the Commission's decision here, this court's role is to review the record for credible and substantial evidence which supports the Commission's determination, rather than to weigh opposing evidence. *See Vande Zande v. ILHR Department*, 70 Wis. 2d 1086, 1097, 236 N.W.2d 255 (1975); *Kimberly-Clark Corp. v. LIRC*, 138 Wis. 2d 58, 67, 405 N.W.2d 684 (Ct. App. 1987).[3]

This court is required to assume, unless there is affirmative proof to the contrary, that the Commission acted

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[3] This court's scope of appellate review is identical to that of the circuit court. *See La Crosse Police Comm. v. LIRC*, 139 Wis. 2d 740, 753, 407 N.W.2d 510 (1987); *Borden Co. v. Industrial Comm.*, 2 Wis. 2d 619, 621, 87 N.W.2d 261 (1958). The task of this court is to determine if the Commission's decision was correct. *See Brakebush Brothers, Inc. v. LIRC*, 210 Wis. 2d 623, 629, 563 N.W.2d 512 (1997). It is clear, of course, that this court owes no special deference to the decisions of either the court of appeals or the circuit court. *See West Bend Co. v. LIRC*, 149 Wis. 2d 110, 117, 438 N.W.2d 823 (1989).

regularly as to all matters and pursuant to the rules of law and proper procedures in making its determination here. *See Davis v. Industrial Comm.*, 22 Wis. 2d 674, 678-79, 126 N.W.2d 611 (1964); *Wright v. Industrial Comm.*, 10 Wis. 2d 653, 662, 103 N.W.2d 531 (1960); *Hakes v. LIRC*, 187 Wis. 2d 582, 586-87, 523 N.W.2d 155 (Ct. App. 1994).

Therefore, Wisconsin law is clear that the burden of proof in an action to review an agency decision is on the party seeking to overturn the agency action, here Heritage, not on the agency to justify its action. *See Harnischfeger Corp. v. LIRC*, 196 Wis. 2d 650, 661, 539 N.W.2d 98 (1995); *Bretl v LIRC*, 204 Wis. 2d 93, 99, 553 N.W.2d 550 (Ct. App. 1996).

In its brief, Heritage asserts that the appropriate standard of review in these cases needs "clarification" by this court. Petitioners' brief at 8-16. The Commission disagrees with this assertion, which has no merit under this court's holdings in *Goranson v. ILHR Department*, 94 Wis. 2d 537, 552-53, 289 N.W.2d 270 (1980), *Kohler Co. v. ILHR Department*, 81 Wis. 2d 11, 22-24, 259 N.W.2d 695 (1977), and *Consolidated Papers, Inc. v. ILHR Department*, 76 Wis. 2d 210, 213-16, 251 N.W.2d 69 (1977). Further, it must be pointed out that two of the arguments advanced here by Heritage are clearly erroneous.

First, this court's power of discretionary reversal under Wis. Stat. § 751.06 does not apply to judicial review under the Worker's Compensation Act. *See Kwaterski v. LIRC*, 158 Wis. 2d 112, 122, 462 N.W.2d 534 (Ct. App. 1990). Second, the limited scope of judicial review granted under the compensation act does not allow the courts to reverse the Commission's decisions on "public policy" grounds. *See Harry Crow & Son, Inc. v. Industrial Comm.*, 18 Wis. 2d 436, 442, 118 N.W.2d 841 (1963); *Town of Russell Volunteer Fire Dept. v. LIRC*, 223 Wis. 2d 723, 734, 589 N.W.2d 445 (Ct. App. 1998).

B. The provisions of § 102.03(1)(f) of the compensation act must be liberally construed to effectuate the remedial purposes underlying such legislation.

The purpose of § 102.03(1)(f) is to give the traveling employe broader protection while working and living on the road. *See Wisconsin Elec. Power Co.*, 226 Wis. 2d at 788; *CBS, Inc.*, 219 Wis. 2d at 579. The provisions of § 102.03(1)(f) must, therefore, be liberally construed in order to afford the broadest coverage of injured traveling workers as is reasonably possible. *See CBS, Inc.*, 219 Wis. 2d at 579.

In situations where § 102.03(1)(f) is found to apply, the traveling employe is clearly afforded "portal-to-portal" coverage, *i.e.*, such an employe is within the course of employment from the time the employe leaves home on a business trip until he or she returns home. *See Black River Dairy Products, Inc. v. ILHR Department*, 58 Wis. 2d 537, 546, 207 N.W.2d 65 (1973); *Bergner v. Industrial Comm.*, 37 Wis. 2d 578, 585, 155 N.W.2d 602 (1968); *Richardson v. Industrial Comm.*, 1 Wis. 2d 393, 396, 84 N.W.2d 98 (1957); 1 *Larson's Workers' Compensation Law*, § 14.01 at 14-2 (2000).

C. The evidence in the record and applicable law amply support the Commission's determination.

I.

The present case, of course, falls within what Professor Larson labels the "prolific category" of deviation-with-drinking cases. *See* 1 *Larson's*, *supra*, § 17.06[1] at 17-33.

In Wisconsin, this court has recognized the need for a case-by-case review of this type of case based upon the specific facts involved and has declined to declare any "bright-line rules." *See CBS, Inc.*, 219 Wis. 2d at 576; *Town of Russell Volunteer Fire Dept.*, 223 Wis. 2d at 738. Thus, a study of its decisions over the years reveals nothing really definite except that each case must be determined upon its own facts and circumstances. *See Phillips*, 56 Wis. 2d 569 – (compensation awarded in case where employe was hit by a car early in the morning, after stopping for a late night snack and visiting several taverns); *Lager v. ILHR Department*, 50 Wis. 2d 651, 185 N.W.2d 300 (1971) – (court reversed a denial of compensation to dependents of a car salesman who allegedly abandoned a business trip to spend a social evening at a tavern and remanded the case to the agency for more specific findings); *Hilbert v. ILHR Department*, 40 Wis. 2d 598, 162 N.W.2d 596 (1968) – (compensation awarded to volunteer fireman who fell from a fire truck on the return trip from a parade despite evidence that he drank beer at two taverns along the return route); *Dibble v. ILHR Department*, 40 Wis. 2d 341, 161 N.W.2d 913 (1968) – (compensation denied in case where a salesman was killed in an automobile accident after driving away from his motel several hours after completing his sales calls for the day and after having numerous drinks in a lounge); *Tyrrell v. Industrial Comm.*, 27 Wis. 2d 219, 133 N.W.2d 810 (1965) – (compensation denied in case where a salesman was killed in an automobile accident after making his last business call when he made a right-angle deviation from his normal route in order to stop at a tavern for drinks); *Olson v. Industrial Comm.*, 273 Wis. 272, 77 N.W.2d 410 (1956) – (compensation awarded to truck driver who had deviated from his business trip to spend

two hours drinking beer, but had returned to the business purpose by starting the return journey to his employer's place of business); *Turner v. Industrial Comm.*, 268 Wis. 320, 67 N.W.2d 392 (1954) – (compensation denied to traveling employe who, after completing his work for the day in Stevens Point, drank martinis at a club and early the next morning was injured in an automobile accident at a point 10 to 12 miles southeast of Stevens Point); *Nutrine Candy Co. v. Industrial Comm.*, 243 Wis. 52, 9 N.W.2d 94 (1943) – (compensation awarded to a traveling salesman who had engaged in a drinking marathon with his traveling companion during the course of a business trip from Madison to Minneapolis, but had returned to the route to Minneapolis at the time of his accident).

However, in its decisions, this court has pointedly refrained from ruling as a matter of law that intoxication is synonymous with personal deviation. *See CBS, Inc.*, 219 Wis. 2d at 576; *Phillips*, 56 Wis. 2d at 579; *Dibble*, 40 Wis. 2d at 350. "Intoxication does not defeat a workmen's compensation claim but only decreases the benefits." *Dibble*, 40 Wis. 2d at 350. These decisions, therefore, indicate that Wisconsin follows the general rule that drinking is only **one** of the components, together with duration, distance, nature of job and surrounding circumstances, that can be considered in the determination of whether or not there has been a personal deviation from the course of employment. *See* 1 *Larson's*, *supra*, § 17.06[1] at 17-35-36.

II.

Heritage first argues that there is no support in the evidence for the Commission's finding that Larsen's purpose in going to Tigerton on January 31, 1996, was business related. Petitioners' brief at 13-15. Relying heavily on *Pressed Steel Tank Co. v. Industrial Comm.*, 255 Wis. 333, 335, 38 N.W.2d 354 (1949), Heritage contends that this determination by the Commission must be rejected as based upon assumed facts which simply do not exist.

Petitioners' brief at 14.[4] However, the facts of this case do not fall within such rule because the Commission found that such assumed facts regarding the business purpose of Larsen's trip were proven to its satisfaction.

This case clearly parallels the situation presented in *Richardson*, 1 Wis. 2d at 397, where the supreme court stated:

> No part of Richardson's testimony was brought into doubt by that of other witnesses; his was the only testimony in the record. Nor is his statement that he intended to call on Loomis in the evening inconsistent with any of the other facts to which he testified or with the exercise of common sense. He was a car salesman; his hours of work were such as he alone determined; his employment involved traveling and selling away from the premises of his employer. What is incredible about a car salesman visiting a prospect in the evening? The fact that he sometimes made sales on the employer's premises does not make his testimony incredible.

The Commission, as the trier of fact, could reasonably infer from the evidence in the record that Larsen's purpose in going to Tigerton on January 31, 1996, was business related. *See CBS, Inc.*, 219 Wis. 2d at 568 n.4.

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[4] *Pressed Steel Tank* is easily distinguishable because there the doctor was present at the hearing, heard the evidence as to the claimant's prior back injury, and then testified that he would revise his earlier opinion as to permanent partial disability. 255 Wis. at 335. In this case, of course, the evidence in the record concerning the business purpose of the trip to Tigerton is unrefuted.

Thus, Heritage's reliance on *Pressed Steel Tank* is misplaced under the holding in *Vinograd v. Travelers Protective Asso.*, 217 Wis. 316, 321, 258 N.W. 787 (1935), where the supreme court warned:

> But the language of an opinion must be considered in connection with the particular facts involved. Applying language pertinent to one state of facts to a different state of facts is seldom warranted.

III.

Heritage strenuously argues that the Commission's failure to find a deviation on Larsen's part is not "reasonable" because substantial evidence suggests that Larsen deviated from the course and scope of his employment activities by consuming unreasonably large quantities of alcohol before arriving at his mobile home. Petitioners' brief at 18. Based upon well-settled compensation law, it is clear that this argument has no merit here. *See Phillips*, 56 Wis. 2d at 577-79.

The Commission found that, even if Larsen had deviated from acts reasonably necessary for living by going to the tavern, the deviation had ceased by the time he arrived at the mobile home. It opined that the determinative fact was that Larsen was performing acts reasonably necessary to living when his injury occurred, *viz.*, he was trying to enter his domicile for the night when he was injured. The Commission's determination was clearly reasonable under this court's holding in *Nutrine Candy Co.*, 243 Wis. at 56, where it was stated:

> The claim that by going on a drunken spree applicant took himself out of the course of employment must be rejected. He was actually en route to Minneapolis at the time he was injured. **It is true that he had made a departure from the course of employment, and if he had been injured in a tavern, no doubt a very strong argument could be made that he was out of the course of employment and entitled to no compensation.** With respect to this, see *Barragar v. Industrial Comm.* 205 Wis. 550, 238 N.W. 368. However, under the evidence in this case, the Industrial Commission was entitled to conclude that he had returned to his duties at the time of the injury.

(Emphasis added).

Accord, Lager, 50 Wis. 2d at 661; *Olson*, 273 Wis. at 274-75.

In essence, the central argument advanced here by Heritage is that this court should hold, as a matter of law, that Larsen's deviation in going to the tavern and drinking was so extensive and involved such added risks totally unrelated to his employment that Larsen had broken the employment nexus and thus ended the business nature of his trip prior to his injury. Simply stated, Heritage contends that § 102.03(1)(f) sets "outer limits" of protection for traveling employes and that Larsen's conduct here took him past those limits. Petitioners' brief at 16.

Heritage points out that our sister state of Michigan did make such a drastic holding in *Bush v. Parmenter, Forsythe, Rude & Dethmers*, 413 Mich. 444, 320 N.W. 2d 858 (1982). Petitioners' brief at 22-23. However, the facts in the *Bush* case were very different from those of the present case.

Bush involved a claim for worker's compensation benefits for the death of an attorney specializing in probate and estate planning who was murdered by gunshot after a seven to eight hour deviation from his return trip home from a trust and investment seminar.

In reversing the lower court's award of compensation, the Michigan Supreme Court agreed with the administrative agency's determination that Bush's pursuit of "bacchanalian pleasures" effectively dissolved any business purpose that had originally existed. Thus, the court stated:

> **This is not a situation in which decedent made a brief stop at the bar after his work mission to have one or two drinks before resuming his travel.** Decedent had traveled almost 40 miles home before he spent the rest of the night drinking. His deviation lasted for seven to eight hours, while the seminar was only an hour long plus a two- to three-hour round trip. If Bush had gone directly home or back to his office after the seminar, he should have arrived back in Muskegon around 6:00 to 6:30 p.m. (or 7:00 to 7:30 p.m. if he had

> gone directly back following the cocktail hour sponsored by the bank) during daylight hours. As it was, he began the last leg of his journey home at 3 a.m. in the dark of night through a high crime area while intoxicated and in a belligerent mood. To say that this did not substantially increase the likelihood of injury is to ignore reality. To find that such conduct did not "dwarf the business portion of the trip" or break the employment injury nexus is to create a rule which could never be applied. We decline to do either and hold that, as a matter of law, decedent's extended night out on the town after he had almost reached home terminated the business purpose of the trip so that when Bush was killed Wednesday morning he was not covered by the act.
>
> VI. CONCLUSION
>
> The plaintiffs' decedent's business detour was so great and unrelated to his business that the deviation dwarfed the business portion of the trip. The deviation was of such nature and length that it extensively increased the likelihood of injury and was clearly unrelated to the purpose of the employment. The business portion of the trip, under the facts of this case, had thereby terminated prior to the tragic occurrence. The ultimate journey home had lost its business character.

320 N.W.2d at 865-66 (emphasis added).

The Commission contends that the present case is a much stronger case for compensation than the *Bush* case and that its award to Larsen comports with the language of § 102.03(1)(f), is consistent with prior appellate decisions and represents a reasonable conclusion based upon the

record here.[5] Moreover, the Commission believes that this court does not need to define the "outer limits" of protection under § 102.03(1)(f) in this case based upon the rationale set forth in *Van Roy v. Industrial Comm.*, 5 Wis. 2d 416, 425-26, 92 N.W.2d 818 (1958):

> **We do not consider it would be appropriate for us in this case to attempt to establish a line of demarcation and declare that all trips by an employee off the premises of the employer for the purpose of ministering to his comfort on the job, which fall within a certain area of space or time, arise out of the employment and that those which extend beyond such boundary line do not.** It would be extremely difficult to draw such a line because the space and time element would necessarily have to be different with respect to an employment in a rural area as distinguished form an urban one. **Whatever may be the line of demarcation, we are satisfied that no**

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[5] It is manifest, of course, that the *Bush* decision is not a binding precedent on this court. *See State v. LIRC*, 136 Wis. 2d 281, 296, 401 N.W.2d 585 (1987); *Larson v. ILHR Department*, 76 Wis. 2d 595, 622, 252 N.W.2d 33 (1977). Even if it was, this case is governed by the principles recently set forth by the court in *United Wisconsin Ins. v. LIRC*, 229 Wis. 2d 416, 423, 600 N.W.2d 186 (Ct. App. 1999):

> Each worker's compensation case is governed by its own facts and circumstances. *See Glodowski v. Industrial Comm'n*, 11 Wis. 2d 525, 530, 105 N.W.2d 833, 836-37 (1960). Because of this principle, "the language of an opinion must be considered in connection with the particular facts involved. Applying language pertinent to one state of facts to a different state of facts is seldom warranted." *Vinograd v. Travelers' Protective Ass'n*, 217 Wis. 316, 321, 258 N.W. 787, 789 (1935). Further, "[a] quotation from an opinion in a prior case is of no value as a precedent without a review of all of the facts and circumstances there present." *Bartell Broadcasters, Inc. v. Milwaukee Broad. Co.*, 13 Wis. 2d 165, 171, 108 N.W.2d 129, 132 (1961).

> **reasonable inference can be drawn from the undisputed facts in the instant case that the accident did not arise out of the employment.**

(Emphasis added).

It is important to remember that this court's confirmation of the award of compensation to Larsen will in no way operate as approval or condonement of Larsen's behavior on January 31, 1996. Thus, as the Michigan Supreme Court aptly stated in *Thomas v. Certified Refrigeration, Inc.*, 392 Mich. 623, 221 N.W.2d 378, 385 (1974):

> In fact it might be said that workmen's compensation, like the gentle rain from heaven, falls upon the just and unjust alike so long as the injury arose out of and in the employment ambience.

The long-standing judicial construction of § 102.03(1)(f) set forth in the *Phillips* case, 56 Wis. 2d at 579, has become part of ch. 102, Stats., and may now be changed only by the Legislature. *See Mulder v. Acme-Cleveland Corp.*, 95 Wis. 2d 173, 186, 290 N.W.2d 276 (1980); *Kohler Co.*, 81 Wis. 2d at 24; *Borello v. Industrial Comm.*, 26 Wis. 2d 62, 70-71, 131 N.W.2d 847 (1965); *Meyer v. Industrial Comm.*, 13 Wis. 2d 377, 382-83, 108 N.W.2d 556 (1961); *Travelers Ins. Co. v. ILHR Department*, 85 Wis. 2d 776, 785, 271 N.W.2d 152 (Ct. App. 1978). Thus, in *Meyer*, 13 Wis. 2d at 382-83, this court aptly stated:

> Assuming, but not admitting, that the reasoning in said cases was erroneous, the rule has become part of the statute and an attempt at this date to overrule our prior decisions would be an exercise of judicial legislation. In *Thomas v. Industrial Comm.* 243 Wis. 231, 240, 10 N.W.(2d) 206, we said:
>
> > "The decision was handed down in 1932 and the construction of the statute adopted has by the well-established doctrine of this court become a part of the statute.

> In *Eau Claire Nat. Bank v. Benson*, 106 Wis. 624, 627, 82 N.W. 604, the court said:
>
> > "'Courts are not responsible for the law. It is their province to declare and apply it and to construe statutes and constitutions in accordance with the will of the lawmaking power, where construction becomes necessary. When such construction has once been given to a law and finally established as a part thereof, it is as much a part of it as if embodied therein in plain and unmistakable language. *State ex rel. Heiden v. Ryan*, 99 Wis. 123. When that situation exists it is the province of the legislature alone to change the law. The court should not attempt it, whatever may be the notions of judges as to what the law ought to be.'"
>
> The above rule was cited with approval in *Safe Way Motor Coach Co. v. Two Rivers*, 256 Wis. 35, 46, 39 N.W.(2d) 847. Therefore any change in the language of the statute because of our construction should be made by the legislature.

IV.

Relying on this court's decisions in *Goranson*, 94 Wis. 2d at 555 and *Weiss v. City of Milwaukee*, 208 Wis. 2d 95, 107-08, 559 N.W.2d 588 (1997), Heritage contends that, while the Commission was correct in applying the "positional risk" doctrine, its analysis was faulty. Thus, on page 26 of its brief, Heritage asserts:

> However, what is ignored by both LIRC and the Court of Appeals, is that in this case Larsen's activities, even if employment related, did not expose him to a zone of special danger. Although

> Larsen did not suffer any injury until after he sought shelter for himself for the evening, the Court of Appeals ignored the distinction between the need for an employee to shelter himself for the night and the employee's action or inaction, purely personal to him, in failing to adequately secure shelter. There is no suggestion whatsoever that the shelter itself was inadequate. The trailer was, in fact, heated. Larsen himself admitted that the frozen pipes thawed after the door of the trailer was closed. (R.6, p. 78) What was inadequate about the shelter was the act of entering the trailer, passing out on the kitchen floor, and failing to close the door. These are factors wholly personal to Larsen and not due to any work related requirements.

It is clear, however, that Heritage's interpretation of *Goranson* represents an overtechnical and strained reading of the case.

At the conclusion of its decision in *Goranson*, 94 Wis. 2d at 557, this court clearly stated:

> The Department is supported by credible evidence in its conclusion that Mr. Goranson **deliberately acted** to place himself in a position where he sustained an injury which was not a risk incidental to his employment relationship with the Whitie's Transportation Company as a bus driver.

The lack of such "deliberate action" by Larsen is what clearly distinguishes the present case from *Goranson*. Thus, in an early compensation case, *Nekoosa-Edwards P. Co. v. Industrial Comm.*, 154 Wis. 105, 108, 141 N.W. 1013 (1913), this court held:

> But there are many cases where, although the drinking is intentional, the intoxication is not; as for instance where one by reason of fatigue, hunger, sickness, or some abnormal condition becomes intoxicated in consequence of imbibing a quantity of liquor which ordinarily would not so affect him.

Moreover, the Commission contends that this line of argument by Heritage mistakenly places the focus on the consequences of Larsen's alleged deviation in the light

of hindsight rather than the extent of the alleged deviation itself. This court clearly rejected such an approach in *Nigbor v. ILHR Department*, 120 Wis. 2d 375, 386, 355 N.W.2d 532 (1984):

> To accept the view that the seriousness of a deviation is to be judged by its consequences would mean that compensation would be denied in any case where the conduct resulted in serious injury or death, even if the deviation was minor. This result would be unfair and would be contrary to the policies underlying the Worker's Compensations Act. Rather, the focus must be on the extent and seriousness of the deviation itself.

CONCLUSION

In the present case, it would be a very narrow and restrictive interpretation of the compensation act to hold that Larsen did not sustain a compensable accidental injury on January 31, 1996. The proper principles to be applied in this situation are clearly set forth by this court in *CBS, Inc.*, 219 Wis. 2d at 579:

> The legislature created Wis. Stat. § 102.03(1)(f) with the intent to give traveling employees broader protection when their employment caused them to be away from home. *See Hansen*, 258 Wis. at 628; *see also Neese*, 36 Wis. 2d at 508. Moreover, we have consistently held that "work[er]'s compensation law must be liberally construed to include all services that can be reasonably said to come within it." *Black River Dairy Products, Inc. v. ILHR Dep't*, 58 Wis. 2d 537, 544, 207 N.W.2d 65 (1973) (citation omitted). LIRC's determination is consistent with that legislative intent to give traveling employees broader protection when working away from home.

The Commission contends that it reached a reasonable conclusion here under the particular facts and circumstances of this case because its decision comports with the language of § 102.03 (1)(f), its legislative history, prior appellate decisions construing the statute and the

basic purpose of the compensation act. *See Lisney v. LIRC*, 171 Wis. 2d 499, 522, 493 N.W.2d 14 (1992). As this court has clearly pointed out, if great weight deference is appropriate, as is the case here, a reviewing court has no authority to second-guess a reasonable interpretation of a statute by an administrative agency. *See Wisconsin Elec. Power Co.*, 226 Wis. 2d at 796.

Therefore, it is respectfully submitted that the final decision of the court of appeals dated March 14, 2000, should be affirmed.

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October 23, 2000

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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced using the following font:

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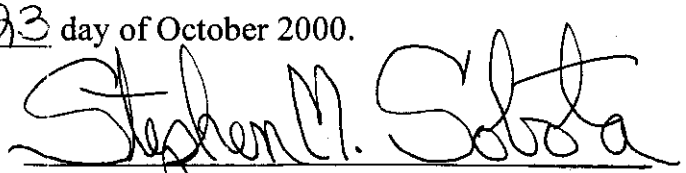
Dated this 23 day of October 2000.



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STATE OF WISCONSIN
IN SUPREME COURT

No. 98-3577

HERITAGE MUTUAL INSURANCE COMPANY and LARSEN LABORATORIES, INC.
Plaintiffs-Appellants-Petitioners,

v.

WILLIAM E. LARSEN and LABOR AND INDUSTRY REVIEW COMMISSION,
Defendants-Respondents

REVIEW OF DECISION
OF THE COURT OF APPEALS,
DISTRICT I, AFFIRMING A FINAL ORDER
OF CIRCUIT COURT FOR MILWAUKEE COUNTY, THE
HONORABLE MICHAEL MALMSTADT,
CIRCUIT JUDGE, PRESIDING

BRIEF OF DEFENDANT-RESPONDENT WILLIAM E. LARSEN

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ISSUES PRESENTED

1. Could the Commission reasonably conclude that William E. Larsen (hereafter Larsen) sustained a compensable accidental injury in the course of his employment on January 31, 1996?

The Court of Appeals answered in the affirmative.

2. Could the Commission reasonably conclude that Larsen's injury resulted from alcohol intoxication pursuant to Wis. Stat., 102.58?

The Court of Appeals answered in the negative.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Larsen believes that publication and oral argument are warranted.

Larsen adopts the reasoning on this issue set forth in the brief of Respondent, LIRC, page 2.

STATEMENT OF THE CASE

The prior decision reached in the case and the current status of the case are accurately set forth in the briefs filed by Petitioner, Heritage and Respondent, Labor and Industry Review Commission.

STATUTES INVOLVED

Wis. Stat., Section 102.03 (1)(f), provides as follows:

> Every employee whose employment requires him to travel shall be deemed to be performing service growing out of and incidental to the employee's employment at all times while on a trip, except when engaged in a deviation for a private or personal purpose. Acts reasonably necessary for living or incidental thereto shall not be regarded as such a deviation. Any accident or disease arising out of a hazard of such service shall be deemed to arise out of the employee's employment.

Wis. Stat. Section 102.23 (1)(e), provides as follows:

> Upon such hearing, the court may confirm or set aside such order or award; and any judgment which may theretofore have been rendered thereon; but the same shall be set aside only upon the following grounds:
>
> 1. That the commission acted without or in excess of its powers
>
> 2. That the order or award was procured by fraud.

3. That the findings of fact by the commission do not support the order or award

Wis. Stat. Section 102.58, provides as follows:

> If injury is caused by the failure of the employee to use safety devices which are provided in accordance with any statute or lawful order of the department and are adequately maintained, and the use of which is reasonably enforced by the employer, or if injury results from the employee's failure to obey any reasonable rule adopted and reasonably enforced by the employer for the safety of the employee and of which the employee has notice, or if injury results from the intoxication of the employee by alcoholic beverages as defined in s. 125.02 (1), or use of a controlled substance, as defined in s. 961.01 (4), or a controlled substance analog, as defined in s. 961.01 (4m), the compensation and death benefit provided in this chapter shall be reduced by 15% but the total reduction may not exceed $15,000.

FACTS

The applicant, William E. Larsen, age 56, was employed as president and salesperson for Larsen Laboratories, Inc. from 1980 through January 31, 1996. [R. 6, Transcript 14; Appendix 114] Although Mr. Larsen conducted sales work primarily by telephone, his sales work also involved travel to existing or new customers on a periodic basis. [R. 6 Transcript 16-20; Appendix 116-120]

In 1993, Larsen Laboratories, Inc.,

established a sales office in a trailer home owned by Mr. Larsen and his wife located in Tigerton, Wisconsin. [R. 6 Transcript 24-25; Appendix 124-125] The trailer was equipped with a facsimile machine, typewriter, telephone, desk and a Rolodex with customer's names. Mr. Larsen had the telephone number for the trailer added to his business card and designated the number as the "Sales" office. [Appl. Exhibit F] Subsequent to 1993, the office was used frequently to make sales telephone calls. [Appl. Exhibit I]

On January 31, 1996, Mr. Larsen left the laboratory of Larsen Laboratories, Inc. to travel to the Tigerton sales office. Prior to leaving, Mr. Larsen informed his wife, also an employee of Larsen Laboratories, Inc., of his intention to travel to the Tigerton sales office for the purpose of performing sales, telephone and paperwork and to travel to a former laboratory customer, Aarow Electric Co., in Shawano, Wisconsin, the following day. [P. 6, Transcript 143-144; Appendix 243-244]

Aarow Electric Co., located in Shawano, a few miles from the Tigerton sales office, had been a customer of Larsen Laboratories, Inc.,

in 1987 and 1988. After Aarow Electric Co. discontinued doing business with Larsen Laboratories, Inc. in 1988, Mr. Larsen continued to attempt to regain their business by contacting them by telephone or in person on a biannual basis. [R. 6, Transcript 43; Appendix 43] Most recently, prior to the date of injury, Mr. Larsen contacted Aarow Electric Co. by telephone on January 16, 1995, and followed up that contact with a letter dated January 26, 1995. [Appl. Exhibits G and J] In that the telephone and letter contact of January 1995 was unsuccessful in reclaiming the Aarow Electric Co. business, Mr. Larsen decided to personally visit Aarow Electric Co. on February 1, 1996, and it was this intention that occasioned the trip to the Tigerton sales office on January 31, 1996. [R. 6, Transcript 46; Appendix 146]

On January 31, 1996, Mr. Larsen left the Oak Creek laboratory and arrived in Tigerton about 3:30 p.m. After stopping at a grocery store and the feed mill in Tigerton for supplies, Mr. Larsen proceeded to the Split Rock Inn, a bar and restaurant located about 3.5 miles from the trailer. Mr. Larsen stayed

at the Split Rock Inn from approximately 4:15 p.m. to around 6:00 p.m., during which time he consumed four to five mixed drinks. It should be noted that Mr. Larsen would routinely consume four to five mixed drinks following a day of work. [R. 6, Transcript 32; Appendix 132] Upon leaving the Split Rock Inn, Mr. Larsen did not feel intoxicated nor did he believe that his ability to operate a motor vehicle was impaired. [R. 6, Transcript 35; Appendix 135]

At around 6:00 p.m., Mr. Larsen drove his motor vehicle directly to the Tigerton trailer. The driveway had been plowed earlier in the day by a neighbor, Mr. Wally Seefeldt, at Mr. Larsen's request. [R. 6, Transcript 35; Appendix 135] Mr. Larsen parked and exited his vehicle and walked to the door of the trailer. The temperature was very cold, perhaps 25 degrees below zero.

Mr. Larsen pulled on the storm door to the trailer and opened it, albeit with some difficulty due to snow piled in front of the storm door. Once the storm door was open, Mr. Larsen took his key and attempted to open the door to the trailer. [R. 6, Transcript 40;

Appendix 140] The key would not open the door, perhaps because the key was new. [R. 6, Transcript 37; Appendix 137] Mr. Larsen became dizzy and attempted to force the door open with his shoulder. Mr. Larsen then attempted to force the door open with a shovel, without success. Mr. Larsen then broke a hole in a plastic window in the door, reached inside the hole to open the door, pushed the door open and, apparently, lost consciousness. [R. 6, Transcript 36-39; Appendix 136-139]

Mr. Larsen's next recollection is waking up just inside the trailer with the trailer door partially open at approximately 8:45 a.m. on February 1, 1996. [R. 6, Transcript 39; Appendix 139] Shortly thereafter, Mr. Larsen's wife called on the telephone. After speaking with Mr. Larsen, Mrs. Larsen called the neighbor, Mr. Seefeldt and asked him and his wife to go and check on Mr. Larsen. Mr. Seefeldt and his wife went to the trailer. They spoke with Mr. Larsen, who advised them that the purpose of his visit to Tigerton was to make a sales call on Aarow Electric Co. on February 1, 1996. [R. 6, Transcript 136;

Appendix 236] Mr. and Mrs. Seefeldt then transported Mr. Larsen to the Shawano Hospital Emergency Department. [R. 6, Transcript 41; Appendix 141]

After receiving treatment for frostbite injuries at Shawano Hospital, Mr. Larsen's care was transferred to St. Luke's Medical Center in Milwaukee. Unfortunately, the frostbite injuries to Mr. Larsen's hands were so severe as to necessitate the amputation of his fingers and thumbs on both hands.

ARGUMENT

I. THE COMMISSION REASONABLY CONCLUDED THAT THERE WAS SUFFICIENT EVIDENCE THAT LARSEN SUSTAINED A COMPENSABLE INJURY UNDER SECTION 102.03 (1)(F), STATS., IN THE COURSE OF HIS EMPLOYMENT ON JANUARY 31, 1996.

A. The standard of review to be employed in this case is well established, needs no further clarification and should be applied in this case.

Larsen agrees with Heritage that claims under Section 102.03 (1)(f) historically have involved mixed questions of fact and law. [Petitioner's brief at page 10, Respondent's brief at pages 9-10] See Sauerwein vs. IHLR

Department, 82 Wis. 2d 294, 301, 262 N.W. 2d 126 (1978); CBS, Inc. vs. LIRC, 219 Wis. 2d 564, 579 N.W. 2d 668 (1997). Simply stated, the conduct of the employee which is at issue presents a question of fact and the application of the pertinent statute to that conduct presents a question of law. Michels Pipeline Construction, Inc. vs. LIRC, 197 Wis. 2d 928, 931-32, 541 N.W. 2d 241 (Ct. App. 1995), Ide vs. LIRC, 224 Wis. 2d 159, 164, 589 N.W. 2d 363 (1999).

Heritage argues, however, that the appropriate standard of review in such cases needs clarification by this court. Heritage does not argue that the standard of review regarding factual determinations made by the Labor and Industry Review Commission needs clarification. Heritage agrees that such factual determinations are to be given great deference. [Petitioner's brief at page 13] Heritage argues, however, that confusion exists as to the standard to be applied to questions of law in the interpretation by the Commission of Section 102.03 (1)(f). [Petitioner's brief at pages 11-12] Heritage argues that in such settings the recent

decision on CBS, Inc. vs. LIRC, 219 Wis. 2d 564, 579 N.W. 2d 668 (1997) altered the standard of review of legal questions by adding a "reasonableness" standard calling for a "value judgement" on the particular issue. [Petitioner's brief at page 15]

Recent case law directly on point on this issue, however, has strongly reaffirmed the appropriate standards of review to be used in reviewing factual and legal questions decided by the Commission.

On the issue of factual determinations made by the Commission, the court reiterated very recently the long held view in the case of Wisconsin Electric Power Co. vs. LIRC, 226 Wis. 2d 778 at 786, 595 N.W. 2d 23 (1999):

> Factual findings of LIRC are conclusive as long as they are supported by credible and substantial evidence and LIRC did not act fraudulently or in a manner which exceeds its powers. Section 102.23 (1)(e). A LIRC order or award may also be set aside if it is unsupported by LIRC's findings of fact, Section 102.23 (1)(e), or depends upon "any material and controverted finding of fact that is not supported by credible and substantial evidence." Section 102.23 (6). However, "the court shall not substitute its judgment for that of the Commission as to the weight or credibility of the evidence on any finding of fact." Section 102.23 (6).

The longstanding standard of review in regard to legal issues has also been reviewed and upheld by the court in two recent cases. First, in 1997, the court in a unanimous decision in CBS, Inc. vs. LIRC, 219 Wis. 2d, 564 at 572-73, 579 N.W. 2d 668 (1997) reviewed and set forth the standard as follows:

> We conclude that it is proper to apply great weight deference to LIRC's interpretation of Section 102.03 (1)(f) in this case based upon the four factor test. This first factor is met by the fact that the legislature, through Wis. Stat. Section 102.14 (1), has charged the LIRC, together with the Department of Workforce Development (DWD), with administering Chapter 102. In administering the chapter, courts have directed the DWD and LIRC to interpret the statute and to make factual findings when determining a claimant's benefits. Id. at 19. The second and third factors are met by the fact that LIRC has interpreted the traveling employee provision for the last fifty three years. See e.g., Armstrong vs. Industrial Comm'n, 254 Wis. 174, 35 N.W. 2d 212 (1948); Hansen vs. Industrial Comm'n, 258 Wis. 623, 46 N.W. 2d 754 (1951). Finally, LIRC's interpretation of Wis. Stat. Section 102.03 (1)(f) will provide uniformity in the application of the statute, as its judgment, rather than the judgments of various courts, will be uniformity applied to traveling employee cases.
>
> Because the proper standard of review in this case is great weight deference, we will affirm LIRC's interpretation of Wis. Stat. Section 102.03 (1)(f) if it is reasonable. See

> Hagen, 210 Wis. 2d at 20 (citing Lisney vs. LIRC, 171 Wis. 2d 499, 506, 193 N.W. 2d 14 (1992). An unreasonable interpretation of a statute by an agency is one that "directly contravenes the words of the statute, is clearly contrary to legislative intent, or is otherwise... without rational basis." Id (quoting Lisney, 171 Wis. 2d at 506).

The standard of review has been more recently reiterated and upheld in the following language as set forth in Wisconsin Electric Power Company vs. LIRC, 226 Wis. 2d 778, 786-87, 595 N.W. 2d 23 (1999):

> The application of Wis. Stat. Section 102.03 (1)(f) to the facts as found by the LIRC presents a question of law which this court reviews under the great weight deference standard. CBS, 219 Wis. 2d at 573-74. The great weight deference standard requires that we uphold LIRC's interpretation of the statute unless it is unreasonable. Id. at 574. See Ide vs. LIRC, 224 Wis. 2d 159, 167, 589 N.W. 2d 363 (1999). "An unreasonable interpretation of a statute by an agency is one that 'directly contravenes the words of the statute, is clearly contrary to legislative intent, or is otherwise... without rational basis"' CBS, 219 Wis. 2d at 574 (quoting Hagen vs. LIRC, 210 Wis. 2d 12, 20, 563 N.W. 2d 454 (1997)).

The standard of review of both the factual and legal issues involved in this case is thus quite clear. The findings of the Commission are to be held in high regard. These high standards of review are based not only on the role played by the Commission

under the comprehensive statutory scheme established by the Legislature under Section 102, but also on its many years of finding facts and applying the statutory rules to these facts. Heritage's argument that the court should step away from these long established precedential rules in deciding this case is not supported by logic or the rule of law and should be rejected.

As to the invitation from Heritage for this court to ignore the appropriate standard of review and reverse this case to prevent a "miscarriage of justice" [Petitioner's brief p. 16], this court should decline the invitation. First and foremost such an approach would ignore Wis. Stat. 102.23 (1)(e) and all prior Wisconsin case law. Second, the decision of the Commission in no way represents a "miscarriage of justice."

Certainly one can question the wisdom of Larsen's decision making on January 31, 1996, beginning with his decision to travel on such a cold day. However, the question here is not whether Larsen's behavior was good or bad but whether it falls within the protection of the Worker's Compensation Act. The decision of

the Commission is entirely consistent with both Wis. Stat. 102 and prior case law interpreting that statute.

Heritage is well aware of the protection afforded traveling employees and the impact of alcohol intake on compensability. Presumably, Heritage charged Larsen an insurance premium premised on what the law required them to cover. It would hardly be a "miscarriage of justice" to require Heritage to provide coverage in a case which is consistent with this court's prior decisions.

B. There is credible evidence in the record to support the Commission's finding that Larsen was in the course of a business related trip at the time of his injury.

In order to come under the protections afforded by the statute, Larsen had the burden of proof before the Commission to establish that he was an employee whose employment required him to travel. Larsen also clearly had the burden of proof to show that he was in the course of his employment at the time of the injury, that is, that he was on a business trip for his employer at the time. The

Commission found that Larsen had met his burden on both of these issues. The Commission carefully reviewed the entire record and consulted with the Administrative Law Judge regarding the credibility and demeanor of the witness on this important issue.

Based on this review the Commission grounded its decision that Larsen was on a business trip on the following facts:

1. Larsen's primary duties were sales and computer programming. [Appendix 281]

2. The company's customers were far flung and Larsen traveled to see current customers and solicit new ones. [Appendix 281]

3. In 1993, Larsen began using his Tigerton mobile home on a periodic basis as a company sales office by using it as a base to make sales calls and a quiet place to perform business paperwork. [Appendix 281]

4. Larsen told his wife before leaving home on January 31, 1996 that he planned to stay overnight at the mobile home that evening, perform company paperwork and make a sales call the next day on a prior customer, Aarow Electric. [Appendix 282]

5. He took company paperwork with him to work on in the evening. [Appendix 282]

6. During the morning of February 1, 1996, before going to the hospital, Larsen told his neighbor, Wally Seefeldt, that he had come to the area to call on Aarow Electric. [Appendix 283]

7. Larsen had discussed prices with a representative of Aarow approximately one year prior (January, 1995) as established by Larsen's testimony and a confirming letter. [Appendix 283]

8. Larsen was credible in testifying that he did not hunt at this time of year and that he had not recently fought with his wife, thus negating personal reasons for the trip, especially during the middle of winter in severely cold weather. [Appendix 283-84]

The Court of Appeals also pointed to the following additional facts to support the Commission's findings on this issue:

1. It was uncontroverted that Larsen called or visited Aarow every six months to a year in an effort to get this business. [Appendix 303]

2. Larsen had spoken to neighbor Seefeldt the morning of January 31, 1996 and asked him to plow the driveway to the mobile home, (Seefeldt had a key to the unit and thus Seefeldt could have checked on the unit) thus negating an additional possible personal reason for the trip. [Appendix 303]

There thus was objective evidence,

testimony from both Larsen and his wife and testimony from independent witness, Seefeldt, that the purpose of the trip was the business call on Aarow the next day. Heritage does not argue or explain how these facts are insufficient to support the finding of a business trip, as found by the Commission and confirmed by the trial court and the Court of Appeals. Instead, the only argument advanced by Heritage on this issue is that the Commission's finding rested on the false premise that Larsen's letter to Aarow regarding pricing was dated in 1996, when it was really dated January, 1995 and thus was not recent.

There is no question from the record but that Larsen had not called upon or written Aarow since January, 1995. Clearly, the reference to a January, 1996 letter is an unfortunate typographical error made by the Commission when the decision was prepared. In light of all the evidence set forth above and presented on this issue, the letter to Aarow is but a small piece of the overall picture. The Commission did not rely on it alone to make its finding. Likewise, the Court should

not, consistent with the standard of review set forth above, overturn the Commission based on a typographical error in the Commission's decision.

C. There is credible evidence in the record to support the Commission's finding that Larsen was engaged in an act reasonably necessary for leaving at the time of the injury.

Larsen agrees with Heritage that the traveling employee statute creates a presumption that an employee who sets out on a business trip is performing services arising out of and incidental to his employment until he returns from his trip. [Petitioner's brief at 17] See Lager vs. ILHR Department, 50 Wis. 2d 651, 658, 185 N.W. 2d 300 (1971); CBS Inc. vs. LIRC, 219 Wis. 2d at 578-79.

To rebut this presumption, Heritage must establish both of the following:

1. That Larsen deviated from the business trip; and

2. Such deviation must be for a personal purpose not reasonably necessary for living or incidental thereto.

   See Hunter vs. DILHR, 64 Wis 2d 97, 101-02, 218 N.W. 2d 314 (1974)

Heritage argued before the Commission and to all subsequent appellate bodies that Larsen deviated from the scope of his employment duties by consuming alcohol at the Split Rock Inn before traveling to his mobile home. [Petitioner's brief at 18] Larsen certainly admitted that he consumed 4 to 5 drinks in less than two hours while at the Inn. [Appendix 132] The Commission inferred from this testimony that Larsen was intoxicated at some point during the late afternoon/early evening of January 31, 1996. [Appendix 285] The Commission did not find, however, that Larsen has deviated from acts reasonably necessary for living or from, the business trip by drinking as he did at the Inn. [Appendix 285] The Commission did find that when injured, Larsen was simply entering his domicile for the night, an act necessary for living, and that during this routine activity he was exposed to a zone of special danger, the extremely cold weather. [Appendix 284] The Commission further stated that if the drinking at the Inn was determined to constitute a deviation, the deviation had ceased by the time Larsen had arrived at his

trailer. [Appendix 285]

It is important to note that in terms of drinking or intoxication by employees in the course of their employment that the full statutory scheme under Chapter 102 does account for this type of occurrence. When looking at the whole of Chapter 102, it is obvious that the legislative policy evidenced by the Chapter is that intoxication does not in and of itself render an injury noncompensable. Instead, Section 102.58, Stats., decreases in such settings the compensation available to the employee by stating:

> If injury results from the intoxication of the employee by alcoholic beverages... the compensation... shall be reduced 15%...

Thus, Section 102.03 (1)(f), Stats., and Section 102.58, Stats., must be read in conjunction in a case such as this to comply with the direction of the Legislative.

Heritage correctly concedes that consumption of intoxicants and intoxication itself does not automatically defeat a worker's compensation claim. [Petitioner's brief at 18-19] Instead Heritage seizes upon

language in Dibble vs. ILHR Department, 40 Wis. 2d 341, 350, 161 N.W. 2d 913 (1968) to the effect that the employee in that case was on a deviation when he took a second trip to a cocktail lounge. Specifically, the Dibble court said:

> While a cocktail or two before dinner probably is an acceptable social custom incidental to an act reasonably necessary to living, the department ***could conclude*** that Dibble's indulgence was beyond reasonableness. Certainly at the time of his second trip to the lounge after he had dinner his indulgence was not an act reasonably necessary or incidental to living. (emphasis provided) 161 N.W. 2d at 918.

Close consideration of this passage from Dibble is instructive. First, the Supreme Court said that "the department *could* conclude that Dibble's indulgence was beyond reasonableness..." In other words, the facts in that record supported the department's unreasonableness determination.

In this case, though, Heritage attempts to take that phrase and distort its meaning to be that whenever an employee has more than one or two drinks it is, as a matter of law, unreasonable. This is way beyond what the Supreme Court said.

Clearly, the legislature has dictated

that the consumption of alcoholic beverages alone does not constitute a deviation from employment. Even consumption of alcoholic beverages to the point of intoxication merely reduces but does not defeat a worker's compensation claim.

The legislature, in passing Sec. 102.58, Stats., dictated how to deal with injuries caused by intoxication and the courts have followed that direction.

Nutrine Candy Co. vs. Industrial Commission, 243 Wis. 52, 9 N.W. 2d 94 (1943) dealt with the issue of extreme intoxication and a one vehicle accident. In stating that such a circumstance did not support a finding that the injury did not arise out of the employment, the Court stated as follows:

> The wisdom of a policy which permits drunken employees to recover even a diminished compensation, where intoxication causes injury, may be arguable as an original proposition, but after all, this is a matter which the legislative intention is clear and t h e legislative power is plenary. Id at 56.

The courts have consistently held that a level of intoxication, no matter how great, does not defeat a claim for benefits. See, City of Phillips vs. DIHLR, 56 Wis. 2d 569,

202 N.W. 2d 249 (1972), where a police chief in town for a convention was killed after walking into the path of a motor vehicle **twice** at 3:00 a.m. with a .24 blood alcohol concentration. See, Haller Beverage Corp. vs. DIHLR, 49 Wis. 2d 233 (1970), where a salesman was killed in a one vehicle accident with a .29 percent blood alcohol concentration. Even Dibble, supra, specifically states that "intoxication does not defeat a worker's compensation claim but only decreases benefits." There is **no** case in Wisconsin to support the theory that consumption of alcoholic beverages, even to the point of intoxication, constitutes a deviation from employment.

To find in this case that alcohol consumed by Larsen constituted a deviation sufficient enough to deny compensation would be to ignore both the full statutory scheme and past legal precedent.

Indeed, the Commission correctly reviewed the nature of Larsen's activities at the time that he crossed over the threshold of his mobile home, some time after he had left the Inn. At that time, Larsen was attempting to

enter his domicile for the night. The Commission found that such an act was an act reasonably necessary for living. Their finding is logical and reasonable. Larsen certainly had to have shelter for the evening consistent with the business plan to visit Aarow in the morning. Whether Larsen had visited the Inn and consumed alcohol or not, he still would have found himself entering the mobile home at some point that evening in the extremely cold weather.

Larsen was thus put into the position of entering his trailer through the need of his business to call upon Aarow. Unfortunately, however, he was exposed to the extremely cold weather in that location that evening.

The Commission utilized the "positional risk" doctrine to indicate that the zone of special danger to which Larsen was exposed was the extremely cold weather and it found that it was by reason of his sheltering himself for that evening (an employment required activity) that he was exposed to this special danger. [Appendix 284]

The "positional risk" doctrine is a body of law that is used to determine the ultimate

issue of whether the accident or disease causing injury arose out of the employment under Section 102.03 (1)(f). See Applied Plastics, Inc., 121 Wis. 2d at 278. In Nash-Kelvinator Corp. vs. Industrial Comm., 266 Wis. 81, 86, 62 N.W. 2d 567 (1954), the Supreme Court explained:

> Ever since the enactment of workmen's compensation laws, courts have had to deal with that class of cases where the mere conditions and obligations of employment constitute a hazard, distinct from those cases in which the risk of injury is presented by the employee's regular duties. From judicial determination of this class of cases there gradually developed the "positional risk" doctrine under which an injury is compensable if it would not have happened but if the employment put the claimant in the position where he was injured. Wisconsin is among the states that have applied this doctrine, and the law is that "'all that is required is that the "obligations or conditions" of employment create the "zone of special danger" out of which the injury arose.'" Butler vs. Industrial Comm., 265 Wis. 380, 385, 61 N.W. (2d) 490. In other words, there is a causal connection between the employment and the injury where the employee is obligated by his employment to be present at the place where he encounters injury through the instrumentality of a third person or an outside force. Such cases include, among others, accidents arising from horseplay, weather conditions, and assaults.

Heritage takes the position that Larsen is not entitled to compensation under this analysis and the Commission's findings by

arguing that the injury force in this case was purely personal to Larsen. Heritage argues Larsen's purely personal act was the securing of inadequate shelter. [App. Brief pages 24-26]

Heritage relies heavily upon Goranson vs. ILHR Department, 94 Wis. d 537, 289 N.W. 2d 270 (1980), as precedent in support of its position. However, such a reliance is misplaced because the facts of this case are readily distinguishable from those in Goranson as explained by the Supreme Court in its decision in Weiss vs. City of Milwaukee, 208 Wis. 2d 95, 107-08, 559 N.W. 2d 558 (1997):

> For example in Goranson, a charter bus driver was injured after he drove a group of people to Green Bay. Upon arriving in Green Bay, the driver checked into a hotel along with his passengers. Later in the evening, he leaped from his third floor hotel room onto to the roof of another section of the hotel two floors below, sustaining a broken hip and other injuries. There was evidence that the driver had been drinking throughout the evening with a woman, and that he had quarrelled in his hotel room with the woman just prior to jumping from the hotel window.
>
> This court upheld a denial of worker's compensation benefits. While there was no dispute that the driver was in the course of his employment at the time of the injury, the court determined that the accident did not arise out of the driver's employment, because the

> injuring force was purely personal to him. Goranson, 94 Wis. 2d at 557.
>
> The facts of this case are distinguishable from those in Goranson. In Goranson, the bus driver's employment did not contribute to or facilitate the accident causing the injury he suffered jumping from the hotel window.

The act of stepping up upon a third floor hotel room window ledge and using that ledge to jump two floors below is readily distinguishable from the act of a person entering his mobile home through the front door. One act is clearly personal and not an act reasonably necessary for living, the other is an everyday event necessary for living which was made dangerous by the extremely cold weather.

Moreover, since the decision by the Supreme Court in Goranson merely resulted in a confirmation of the agency's findings of fact, it is **not** a controlling precedent here. See Schawb, 40 Wis. 2d at 693; Burt Brothers vs. Industrial Comm., 225 Wis. 488, 491, 39 N.W. 2d 388 (1949).

As well set forth in the brief filed in the court by the Commission, this court has long recognized the need by the Commission for a case-by-case review where drinking of

alcohol is involved in a traveling employee case under Section 102.03 (1)(f). [Respondent's brief at 13-14] Clearly, these decisions do not establish a bright line rule of non-compensation. These decisions indicate that drinking of alcohol is but one of the components, together with duration, distance, the nature of the job and all of the surrounding circumstances.

The Commission's decision in this case, accounting for each of these factors, is consistent with both past precedent in similar cases, the long standing judicial construction of section 102.03 (1)(f) set forth in Phillips vs. ILHR Department, 56 Wis. 2d 569, 201 N.W. 2d 249 (1972) and the overall legislative scheme of Chapter 102 as established by the legislature.

In this case the duration and extent of the drinking of alcohol was low. Larsen testified that the extent of his drinking that late afternoon was not out of the ordinary for him and that he was not intoxicated. In addition, Larsen was returning to his abode that evening to do additional business related paperwork after eating dinner. There was thus

evidence for the Commission to conclude that Larsen had not deviated from his business trip by his stop at the Inn.

II. THERE IS NO CREDIBLE EVIDENCE IN THE RECORD TO SUPPORT THE COMMISSION'S FINDING THAT LARSEN'S DRINKING OF ALCOHOL CAUSED HIS INJURIES.

The Commission inferred from Larsen's testimony concerning how much he drank that he was intoxicated on evening of January 31, 1996. The Commission further inferred that this intoxication was a substantial factor in causing Larsen's frostbite injuries. The Commission inferred that the specific effect of Larsen's inferred intoxication was that he remained asleep for an extended period of time, thus causing his hands to become frostbitten. [Appendix at 285-86] Based on these findings, the Commission reduced the applicable compensation by 15% pursuant to Section 102.58, Stats.

The trial court, upheld by the Court of Appeals, however, overturned this portion of the Commission's findings, holding that there was sufficient evidence to prove Larsen's intoxication but that there was no evidence that a person in such a state is more likely

to remain asleep nor any evidence that if Larsen had not remained asleep for as long as he did that he would not have received frostbite. [Appendix 295, 308-09]

Larsen agrees with Heritage that the employer bears the burden of proof to prove that Larsen was intoxicated. Petitioner's brief at page 28. See Haller Beverage Corp vs. DILHR, 49 Wis. 2d 233, 237, 181 N.W. 2d 418 (1970). Importantly, however, Heritage must also bear the burden of proof to show that any such intoxication was a cause of the injury.

Haller Beverage Corp vs. DILHR, 49 Wis. 2d 233, 181 N.W. 2d 418 (1970) is instructive on these points. The employee in that case, during the course of his employment, crossed over into a bridge abutment, killing himself. Blood samples revealed a .29 percent alcohol by weight in his blood. Compensation was conceded by the employer but a hearing was held on the intoxication issue. The employer presented expert testimony that the employee was intoxicated based on the blood alcohol finding. No expert testimony, however, was offered on the issue of a causal connection

between the intoxication and the accident. On the causation issue, the employer relied on the absence of evidence as to other causes to support it's contention. The Commission determined that the employee was intoxicated but held that the employee had failed to meet its burden of proof on the causation issue, thus denying the 15% compensation reduction.

The Supreme Court affirmed the judgment of the Commission on all issues. The Court pointed out in the following language the burden on the employer regarding causation, Haller Beverage Corp vs. DILHR, 49 Wis. 2d at 236:

> In meeting a burden of proof, absence of testimony is not the same as presence of testimony. It is true that the employer and insurance carrier were not required to negate all possible explanations of the car veering to hit the abutment. But they were required to establish a causal link between the condition of intoxication and the injury. This they did not do. Their expert witness did not testify that the .29 percent alcohol in the blood, standing alone with no corroborating physical evidence, was the cause of the car hitting the abutment. In fact, he did not give an opinion as to the cause of the accident and death.

Larsen agrees that the Commission's findings in this case are factual findings entitled to the significant weight set forth

in Wisconsin Electric Power Co., 226 Wis. 2d at 786-87 as set forth above. However, as set forth above there must be some credible evidence to support the intoxication and causation findings. It is inappropriate for LIRC to disregard the evidentiary record and interpose its own factual influences. See Leist vs. LIRC, 183 Wis. 2d 450, 515 N.W. 2d 268 (1994).

In applying these rules to the facts of this case it is least of all important to note what the Commission did not infer on these issues. The Commission did not find that Larsen passed out due to his drinking of alcohol. The reason for this is that there was no credible evidence that this occurred. A number of potential reasons for his problem that evening were included within the record, including Larsen's use of Dexatrim, his significant exertion, the extremely cold weather and his drinking of alcohol. Under the Haller Beverage Corp. holding, it was Heritage's burden to present expert testimony as to the causal connection between any intoxication and the injury, but none was presented.

Likewise, there is no evidence of any type, expert or otherwise, in the record to support the Commission's inference that Larsen remained asleep long enough to experience frostbite due to his alcohol consumption. Such a determination really requires two findings:

1. That Larsen's level of intoxication kept him asleep for a certain number of hours, and

2. The number of hours required for frostbite to the hands is more than the number of hours that Larsen would have remained asleep without having consumed alcohol.

No testimony of any type was presented by Heritage on these issues and this Commission's findings in this regard were not based on the evidentiary record.

Comparing the present case to the activities and findings of the Haller Beverage Co., case set forth above is instructive. The employee in Haller Beverage Co., had a blood alcohol level of .29 but yet expert testimony was provided to prove that he was intoxicated. In this case there is no blood alcohol information available to determine the extent of any intoxication at the time Larsen was

entering the mobile home and no expert testimony to establish intoxication. Despite the high blood alcohol level in Haller Beverage Corp., and the one car accident where a car crossed the opposing lanes of travel and hit a bridge abutment, the court still required expert testimony to establish causal connection. The present factual setting is even more uncertain as to a causal connection due to the unknown blood alcohol level, the surrounding circumstances of exertion, Dexatrim use, extremely cold weather, the uncertainty of the effects of alcohol on sleep patterns and the uncertainty as to the time necessary in the cold to cause the frostbite injuries. Expert testimony on these issues was necessary for Heritage to prevail on the 15% reduction issue.

The medical records presented into evidence by Heritage and cited in its brief do not address these issues. First, the records generally only give a history of the event (often second or third hand) and do not address the causation issues set forth above. Second, no information is offered as to the expertise of any of these physicians to even

address such causation issues. In fact, records from a psychiatrist and a renal consultant are offered by Heritage. Larsen submits that such physicians are not competent to address the causation issues involved in this case. Third, in their reports or records the physicians are not addressing or being asked to think about these causation issues, they are concerned only about treating Larsen. Their speculative writings are therefore extremely suspect and cannot be relied upon by the Commission in determining causation. In fact, the court should note that none of these records were cited by the Commission to support its intoxication and causation findings. [Appendix 285-86] The Commission cited no facts to support its inferences on intoxication and causation.

It is important to consider that this court's confirmation of the award of compensation to Larsen without a 15% reduction will in no way operate as approval of Larsen's behavior on January 31, 1996. The long standing judicial construction of the application of Section 102.58 binds the court to uphold the Court of Appeals decision in

this case. If these rules are to be challenged, this must be accomplished by the Legislature. See Meyer vs. Industrial Comm., 13 Wis. 2d 377, 382-83, 108 N.W. 2d 556 (1961).

CONCLUSION

It is respectfully submitted that the final decision of the Court of Appeals dated March 14, 2000 should be affirmed in full.

Dated at Waukesha, Wisconsin, as of the Thirtieth day of October, 2000.

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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced using the following font:

Monospaced font.

The length of the brief is 36 pages.

Dated at Waukesha, Wisconsin, as of the Thirtieth day of October, 2000.

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SUPREME COURT OF WISCONSIN

HERITAGE MUTUAL INSURANCE COMPANY and
LARSEN LABORATORIES, INC.,

Plaintiffs-Appellants-Petitioners,

v.

Court of Appeals
Case No. 98-3577

WILLIAM E. LARSEN and
LABOR AND INDUSTRY REVIEW COMMISSION

Trial Court
Case No. 98-CV-003116

Defendants-Respondents.

REVIEW OF A DECISION OF THE COURT OF APPEALS,
DISTRICT I, AFFIRMING A FINAL ORDER OF CIRCUIT COURT
FOR MILWAUKEE COUNTY, THE HONORABLE MICHAEL MALMSTADT,
CIRCUIT JUDGE, PRESIDING

REPLY BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFFS-APPELLANTS-PETITIONERS, HERITAGE MUTUAL INSURANCE COMPANY AND LARSEN LABORATORIES, INC.

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ARGUMENT

I Clarification by this Court is needed to determine the appropriate standard of review.

In its initial brief, Heritage raised the question as to whether, indeed, there has been a shift in the standard of review to be applied in cases arising out of the traveling employee statute, Section 102.03(1)(f), Stats. Heritage noted that deviation issues were once simply deemed issues of fact. *Hunter v. ILHR, Dept.*, 64 Wis.2d 97, 102, 218 N.W.2d 314 (1974). More recently, however, it appears that this court has shifted to treating these issues as involving conclusions of law. *CBS, Inc., v. LIRC,* 219 Wis.2d 564, 572, 579 N.W.2d 668 (1997). These concerns are not the concerns of Heritage alone. Several members of this Court have raised these same concerns. *CBS, Inc., supra,* at 583 (Crooks, concurring).

In response, LIRC summarily dismisses Heritage's concerns. LIRC asserts that Heritage's concerns regarding the standard of review simply "have no merit." (LIRC Brief, p. 11) Instead, LIRC and Larsen assert that the appropriate standard of review is clear and is the standard of review set forth in the case of *Wisconsin Electric Power Co. v. LIRC,* 226 Wis.2d 778, 595 N.W.2d 23 (1999), which Larsen contends merely "reaffirms" the appropriate standard of review. (Larsen Brief, p. 10)

The standard of review, as actually set forth in *Wisconsin Electric, supra,* is what is called a great weight deference standard which requires that LIRC's interpretation of the statute be upheld unless it is "unreasonable." Unreasonableness is defined as:

> An unreasonable interpretation of a statute by an agency is one that directly contravenes the words of the statute, is clearly contrary to legislative intent or is otherwise . . . without rational basis. *Wisconsin Electric, supra,* at 787,

> citing *CBS, Inc. v. LIRC,* 219 Wis.2d 564 at 574, 579 N.W.2d 668 (1998), quoting *Hagen v. LIRC,* 210 Wis.2d 12, 20, 563 N.W.2d 454 (1997).

The citation to the *CBS, Inc.*, case is interesting. In *CBS, Inc.*, it appears that this court has adopted or required a "value judgment" standard, which is understandable given its determination that a decision of LIRC is "unreasonable" if it is contrary to legislative intent or is otherwise without rational basis.

Heritage concedes that no matter what standard review is to be applied under the facts of this case, "value judgment," "great weight deference," or "any credible evidence" the standard of review is high. Indeed, this is how it should be. The effective enforcement of the worker's compensation statute requires deference to the agency's expertise or interpretation of the worker's compensation statutes. See *Anheuser Busch, Inc. v. Industrial Commission,* 29 Wis.2d 685, 139 N.W.2d 652 (1965); *Hansen v. Industrial Commission,* 258 Wis. 623, 46 N.W.2d 754 (1951). Contrary to Larsen's suggestion, Heritage is not suggesting that this Court should step away from prior precedent. (Larsen Brief, p. 13) What Heritage is suggesting is that this Court should declare what the appropriate standard of review actually is in this case.[1] Yet, even the utilization of a high standard of review does not mean that the courts are to serve as nothing more than rubber stamps for all decisions of LIRC. If this were true, then Heritage would have expected extensive argument by LIRC

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[1]Heritage concedes that the "public policy" determinations are in fact made by the legislature and the court's discretionary reversal powers are circumscribed by Chapter 227 of the Wisconsin Statutes. Heritage argues, however, that this court's application of a "value judgment" standard requires it to consider whether the "envelope" is being pushed beyond the legislative intention to provide general protection for traveling employees. *Wisconsin Electric, supra,* at 796.

concerning the Circuit Court's reversal of LIRC's findings concerning intoxication. Instead, LIRC is completely silent on this issue. Rather, LIRC indicates in a footnote on Page 8 of its Brief that it "acquiesced" in the Circuit Court's decision and summarily indicated that it would simply not brief the issue any further.

Left silent in this "acquiescence" is an understanding of how the Commission could be wrong on this issue given the review standard proposed by LIRC. Is LIRC now suggesting, at least as to Section 102.58, Stats., that its conclusions should not be given great weight deference? Or is it suggesting that as to the record in this case – as least as to one issue – there is no credible evidence to support its finding?[2] Finally, how can a reviewing court be asked to affirm a commission finding in all respects, as to one issue, based on the record and at the same time, be asked to overrule a commission finding in all respects as to another issue, based on the same record?

These questions are essentially unanswered by LIRC. However, if this Court adopts a standard of review upholding the Commission's findings, if they are reasonable, and further applies a rational value judgment to the facts at hand, then this court must over-rule the Court of Appeal's decision in this matter.

II The finding of compensability in this case is not reasonable.

Both Larsen and LIRC suggest that what Heritage is seeking is a declaration by this court overturning the longstanding rule that evidence of intoxication, standing alone, is

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[2]Heritage notes with interest the dismissal of a factual finding made by LIRC in finding that Larsen was engaged in employment related activities as evidenced by a "recent" letter to a prospective customer. Both Larsen and LIRC contend that this statement was simply an unfortunate "typographical error." If the purported date of the letter introduced in evidence is nothing but a "typographical error," how can it be described as recent?

evidence of a deviation from employment related duties which result in the defeat of a worker's compensation claim. LIRC suggests that Heritage is seeking to establish a "bright-line" rule concerning intoxication as proof of a non-employment related deviation.

Heritage is contending no such thing. Heritage has conceded that the consumption of intoxicants does not automatically defeat a worker's compensation claim, although it can be used to demonstrate an intent to deviate from the course and scope of employment. *Dibble v. IHLR, Dept.*, 40 Wis.2d 341, 350, 161 N.W.2d 913 (1968).

What Heritage is asking this Court to do is apply a "value judgment" to a situation where a worker, who exposes himself to the heavy use of intoxicants, becomes injured through a force purely personal to him. In other words, the "positional risk analysis" relied upon by LIRC requires a denial of compensation in this case.

In his brief, Larsen strenuously contends this case simply involves a situation where a worker, required by work related duties, is exposed to cold weather and is injured as a result of this exposure. Indeed, Larsen appropriately contends that whether or not he had visited a tavern and consumed his apparent daily dose of alcohol in a short period of time, he still would have found it necessary to enter the mobile home and secure shelter for himself. (Larsen Brief, p. 24) What Larsen is understandably ignoring, however, is the fact that although exposure to cold weather can be a special zone of danger, in this case Larsen's activities, even if employment related, did not expose him to a zone of special danger. Instead, what Larsen and the Commission fail to distinguish is the need for an employee to shelter himself for the evening and the employee's action or inaction, purely personal to him, in failing to adequately secure the shelter. There is no evidence whatsoever that the shelter

itself was inadequate. The trailer was, in fact, heated. Larsen himself admitted that the frozen pipes thawed after the door of the trailer was closed. (R. 6, p. 78; App. 178) What was inadequate about the shelter, was the act of entering the trailer, passing out on the kitchen floor, and failing to close the kitchen door.

Both Larsen and LIRC claim that Heritage's reliance upon the case of *Goranson v. ILHR, Dept.*, 94 Wis.2d 537, 289 N.W.2d 270 (1980), is either "misplaced" (LIRC Brief, p. 26) or is "over technical and strained" (Larsen Brief, p. 22). Of interest, however, is that neither Larsen nor LIRC dispute the factual analogy between this case and the case presented in *Goranson.* Rather, they argue that Heritage's reliance on *Goranson* is misplaced because of perceived distinguishing facts. Obviously, all cases can be distinguished. However, because each case may present distinguishing characteristics, however, does not mean that the controlling principles elucidated in those cases can be ignored.

What is interesting about the arguments of both LIRC and Larsen is that they take great pains to emphasize that a confirmation of compensability will not result in judicial approval of Larsen's actions. (LIRC Brief, p. 20; Larsen Brief, p. 35) Yet, Larsen also contends that, "In this case, the duration and extent of the drinking of alcohol was low."[3] (Larsen Brief, p. 28) What should not be forgotten is that LIRC did make a factual determination of intoxication. LIRC on appeal ignores this factual finding and simply indicates, in a footnote, that it has no intention of even briefing the issue. Larsen does not ignore this finding but contends that it was erroneous.

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[3]At the grocery store, before his stop at the tavern, Larsen also purchased, among other supplies for his alleged one customer sales call, a bottle of Kessler's Whiskey. It was his intention to have more drinks at the trailer upon arrival. (R. 6, p. 92-94; App. 192-194)

The consumption of alcohol, as found by LIRC, and as amply documented in the record, cannot be neatly separated from the weather conditions experienced on the evening that Larsen sustained his injuries. There was nothing about the duties of employment, nor the hazards associated with cold weather that caused Larsen's injuries. What caused his injuries was failing to adequately secure shelter as a result of factors purely personal to Larsen and not to any work related requirements.

Finally, Heritage urges the Court to find as the Michigan Supreme Court did, in *Bush v. Parmenter, Forsythe, Rude & Dethmers,* 413 Mich. 444, 320 N.W.2d 858 (1982), that Larsen's pursuit of "bacchanalian pleasures" effectively dissolved any alleged business purpose. LIRC's categorization of the *Bush* holding as "drastic" ignores reality and common sense. It is noteworthy that Larsen has nothing to say about the *Bush* holding in his brief.

III The Commission's findings concerning intoxication were reasonable.

LIRC resolutely refuses to discuss the intoxication issues raised in this case. Larsen, however, is not so reticent. Larsen essentially argues that the Commission's finding of intoxication may be completely ignored since, according to Larsen, there is no causal connection between the intoxication and the injury. In essence, Larsen argues that, "It is inappropriate for LIRC to disregard the evidentiary record and interpose its own factual influences [inferences?]." (Larsen Brief, p. 32)

In fact, as previously noted by Heritage, the Supreme Court has previously declared that in regard to certain subjects, LIRC possesses its own level of expertise or expert knowledge. *McCarthy v. Sawyer-Goodman,* 194 Wis. 198, 205, 215 N.W. 824 (1927); *Anheuser-Busch v. Industrial Commission,* 29 Wis.2d 685, 139 N.W.2d 652 (1965). If, in

fact, LIRC is to be given a certain amount of latitude in reaching its findings, it is unclear as to why LIRC's findings cannot be upheld regarding intoxication.

As previously noted by Heritage, this case does provide for some troubling evidentiary issues. Heritage contends that the burden of proof required of employers is not synonymous with an impossible standard.

In his brief, Larsen notes that there was no blood alcohol information available to determine the extent of intoxication. (Larsen Brief, p. 33) Without this underlying foundation, Larsen contends that it is impossible to provide the causal nexus between intoxication and the extent of injuries sustained.

In this case, of course, LIRC did not simply have the testimony of the applicant, Larsen, available to it. LIRC also had numerous and extensive medical records as well.

LIRC had before it the consultation report of Dr. Goldmann who noted: "After a drinking binge consisting of 6 - 8 drinks, he attempted to go home about 6:00 at night." (R.6, Supp. App. 312)

LIRC had before it a psychiatric consultation of the Family Health Plan wherein it was noted: "He apparently had gone into the mobile home and not shut the door tightly and he had had several drinks and passed out." (R. 6, Supp. App. 313)

Finally, the Commissioner had before it a renal consultation performed on February 2, 1996, by Dr. Matthew Hanna wherein Dr. Hanna stated:

> Consultation is regarding acute renal failure rhabdomyolysis. This 54-year-old white male with a history of heavy ethanol use and smoking presented to his local emergency department yesterday with frostbite injury to the hands, face and feet.

> He reports "passing out" in a mobile home on the evening of January 31, 1996, after having several drinks and awoke 8-9 hours later in an unheated trailer. He presented to his local emergency department with severe frostbite injury to the hands evidence as well as involving the nose and ears and feet.
>
> . . .
>
> IMPRESSION:
> 1. Ethanol abuse
> **2. Loss of consciousness secondary to the above** . . .

(Emphasis added.) (R.6, Supp. App. 314-315)

LIRC could reasonably interpret this specific evidence in conjunction with its own expertise as sufficient to establish the necessary, "causal link between the intoxication and the injury." *Haller Beverage Corp. v. ILHR Department*, 49 Wis. 2d 233, 181 N.W. 2d 418 (1970). Such a determination was within the fact finding authority of LIRC and it is also noted that the drawing of reasonable inferences from ambiguous, incomplete, or even indefinite medical evidence is the exclusive function of the Commission. *Ruff v. LIRC*, 159 Wis. 2d 239, 245, 464 N.W. 2d 56 (Ct. App. 1990).

As indicated in its initial brief, Heritage cites numerous cases which stand for the proposition that "conclusive" proof of intoxication is not necessary or even possible. *City of Milwaukee v. Antczak,* 24 Wis.2d 480, 128 N.W.2d 125 (1963); *Baird v. Cornelius,* 12 Wis.2d 284, 293, 107 N.W.2d 278 (1960); *State v. Bailey,* 54 Wis.2d 679, 196 N.W.2d 664 (1972); *City of Milwaukee v. Johnston,* 21 Wis.2d 411, 124 N.W.2d 690 (1963).

There is ample support in the record for the Commission's conclusion that intoxication was a substantial factor in causing Larsen's injuries. Whether the Commission

cited the medical records in support of its conclusion is not determinative. What is important is that the evidence exists.

Heritage is not asking this Court to approve or disapprove of Larsen's conduct. Rather, Heritage is asking this Court to give guidance as to the required level of proof needed to establish a reduction of benefits pursuant to Section 102.58, Stats. If the court is going to impose a virtually impossible standard of proof, then it will essentially nullity Section 102.58, Stats., which would be improper. See *State v. LIRC,* 136 Wis.2d 281, 288, 401 N.W.2d 585 (1987). On the other hand, if this Court is going to hold that LIRC's conclusions should be given "great weight deference," then the conclusions of LIRC must be upheld.

CONCLUSION

For the reasons set forth in its initial Brief and this Reply Brief, it is requested that this Court reverse the decision of the Court of Appeals, dated March 14, 2000, and hold that Larsen is not entitled to compensation under the Worker's Compensation Act for his injuries.

If this Court determines that compensation is warranted, it should reinstate the 15% compensation reduction pursuant to Section 102.58, Stats.

Dated this 13 day of November, 2000.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief and appendix produced with proportional serif font. The length of the brief is 2635 words.

This brief was prepared using WordPerfect word process software. The length of the brief was obtained by use of the Properties Information function of the software.

Dated this 13 day of November, 2000.

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SUPREME COURT OF WISCONSIN

HERITAGE MUTUAL INSURANCE COMPANY and
LARSEN LABORATORIES, INC.,

Plaintiffs-Appellants-Petitioners,

v.

Court of Appeals
Case No. 98-3577

WILLIAM E. LARSEN and
LABOR AND INDUSTRY REVIEW COMMISSION

Defendants-Respondents.

Trial Court
Case No. 98-CV-003116

REVIEW OF A DECISION OF THE COURT OF APPEALS,
DISTRICT I, AFFIRMING A FINAL ORDER OF CIRCUIT COURT
FOR MILWAUKEE COUNTY, THE HONORABLE MICHAEL MALMSTADT,
CIRCUIT JUDGE, PRESIDING

SUPPLEMENTAL APPENDIX OF PLAINTIFFS-APPELLANTS-PETITIONERS, HERITAGE MUTUAL INSURANCE COMPANY AND LARSEN LABORATORIES, INC.

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SUPPLEMENTAL APPENDIX

TABLE OF CONTENTS

St. Luke's Medical Center
Aurora Health Care
2900 West Oklahoma Avenue
Milwaukee, WI 53215-4395

CONSULTING PHYSICIAN: Thomas E. Kinney, M.D.

ADMIT DATE: 02/02/96
CONSULTATION DATE: 02/03/96

TYPE OF CONSULTATION:

BRIEF HISTORY: I was asked to see in consultation Mr. William Larsen who is a 54-year-old right handed self-employed gentleman who was admitted yesterday for severe frost bite. Mr. Larsen's history is notable for taking a trip up to the Shawano area on 1/31/96 where he apparently owns a trailer. After a drinking binge consisting of 6-8 drinks, he attempted to go home about 6 o'clock at night. He was unable to get into the front door due to difficulty with the lock. In addition he stated he was starting to have chest pain and shortness of breath and was to the point of "passing out." He subsequently broke the wooden door down with his fists and make it into the trailer. At that time, although the trailer was heated to anywhere between 50-60°, the door remained open. At this point he passed out and subsequently remained lying next to the door for approximately 8-12 hours until a neighbor found him the following morning on 2/1/96. At that time he was taken to the Shawano emergency department where during transit, his hands and body were slowly warmed in the car as well as in the emergency department. Upon arrival he was given a tetanus toxoid. Local treatment commenced at that time and due to concerns for severe frost bite he was transferred down to Milwaukee for hyperbaric therapy.

The patient is presently complaining of numbness in both hands.

PAST SURGICAL HISTORY: Cataract surgery bilaterally.

PAST MEDICAL HISTORY: There is no history of diabetes, hypertension, heart, lung or kidney problems.

ALLERGIES: PENICILLIN.

MEDICATIONS: Dexatrim.

SOCIAL HISTORY: Tobacco - he has an 80-pack-year smoking history. Alcohol - the patient admits to drinking 8-10 drinks a day. He is married.

PHYSICAL EXAMINATION: This is a well-developed, well-nourished gentleman in a moderate amount of distress. He is presently afebrile.

Evaluation of the face reveals a moderate amount of puffiness bilaterally. His ears are edematous and erythematous but do have capillary refill.

LARSON, WILLIAM 3/15/96 AP. 9-16-53-010

PSYCHIATRIC CONSULTATION

REFERRED BY: E. Christianson, M.D.

HISTORY OF PRESENT ILLNESS:

The patient is a 54 year old married man who was admitted to Mount Carmel Nursing Home a few weeks ago after a serious incident in which he had been found unconscious in his mobile home north of Shawano. He had gone up there for a weekend as he is an avid deer hunter, and outdoor type of person. He apparently had gone into the mobile home and not shut the door tightly and he had had several drinks, and passed out. His wife tried to reach him and could not; he did not answer the phone. She called friends nearby and they went there a few hours later and found him unconscious. However, he was rather quickly revived; was taken to a hospital in Shawano, and then to a hospital in Appleton, and then down to St. Luke's Hospital in Milwaukee, and then eventually was transferred to Mount Carmel Nursing Home.

The situation was that when he was found unconscious, it was found that he had severe frostbite of the nose, ears, and all of his fingers, some toes, and parts of his heels. The patient was treated with hyperbaric oxygen at St. Luke's along with elaborate other treatments and debridement and he is now awaiting plastic surgery which will probably be done by Dr. Harvey Bock within the next week or so. It is likely that he will lose several fingers but it's not clear to me whether he'll lose any part of his foot/feet.

In his history it states that he's been in the habit of drinking several drinks per day for a number of years, and he is also a heavy smoker, both of which will be dangerous to him in the future, and I was asked to see him and to assess how he will react to the stresses of this.

He is a very pleasant and cooperative person. He did not know for sure ahead of time that I was going to be seeing him. As a matter of fact, while I was seeing him, the contact person for Family Health Plan came in the room to let him know that I was coming to see him, but I had already been talking with him.

This man is 54 years old, is married, and has three children by a previous marriage, and he has two sons of his own. He and his wife and three sons work in his business which is some kind of metal analysis business which is quite successful in Cudahy where they live. He has been in the habit, for a number of years, upon coming home, of having five-six drinks and occasionally having seven or eight, which are usually whiskey and soda. He is also smoking three packs of cigarettes per day. He denies ever having gotten any tickets for drunken driving, and has had only two tickets over the many years for speeding he said. He and his wife have had the mobile home up near Shawano for about five years but she does not always go with him. He had went up alone this last time; what happened is noted above.

In regard to his drinking history, he states that he drinks only because he enjoys having a drink; he has quit at various times for a couple of months at a time, especially when he gets worried about his weight which may edge up from 175 to 190 lb. At those times he may go on a drastic almost fasting diet, and stop drinking for several weeks, and then loses the weight. However, he does not stop smoking. Has been smoking for many years three packs a day. He denies having had any withdrawal symptoms; denies having any mornings when he wakes up and absolutely has to have a drink in order to calm his nerves. He rarely drinks in the morning, if so, it would be on the weekends.

He tends to deny the seriousness of the alcohol, and doubts very much that his passing out was due to the alcohol; he thinks it might have been due to his going on diets periodically.

He has quit smoking for as much as one and a half years on two different occasions, but then he goes back to it again.

St. Luke's Medical Center
Aurora Health Care
2900 West Oklahoma Avenue
Milwaukee, WI 53215-4395

CONSULTING PHYSICIAN: Matthew H. Hanna, M.D.

ADMIT DATE: 02/02/96
CONSULTATION DATE: 02/02/96

RENAL CONSULTATION

Consultation is regarding acute renal failure and rhabdomyolysis. This 54-year-old white male with a history of heavy ethanol use and smoking presented to his local emergency department yesterday with frostbite injury to the hands, face and feet.

He reports "passing out" in a mobile home on the evening of January 31, 1996, after having several drinks and awoke 8-9 hours later in an unheated trailer. He presented to his local emergency department with severe frostbite injury to the hands evident as well as involving the nose and ears and feet. He was transferred to Appleton Medical Center on that date at which time his serum creatinine was 2.3 and electrolytes were normal. His CPK was 9,000. He was given intravenous normal saline and had a low temperature of 99-100°. He has been nonoliguric. A CT scan of the brain without contrast was ordered (the results are not known to me). He has been alert and oriented. Today's laboratory indicate that his CPK was 10,500 and a serum creatinine was 4.6. He is continued on intravenous normal saline and transferred here for hyperbaric oxygen therapy with an indwelling Foley catheter in place. He appears to have had 500-600 cc of urine output over the past eight hours. His first hyperbaric oxygen treatment has just been completed after undergoing bilateral myringotomy. No laboratories have yet been performed here. His blood pressure and vital signs have been stable.

PAST MEDICAL HISTORY: Unremarkable for any prior genitourinary surgery or x-rays. He denies any prior history of renal disease, urinary tract infections, hematuria, stone disease, flank pain or voiding symptoms. He has had no nephrotoxic exposures. He denies the use of nonsteroidal anti-inflammatory drugs or analgesics except for an occasional aspirin. He has no history of gout, hypertension or diabetes mellitus.

He has been an 80+ pack year smoker and has 7-8 drinks per night. Other than a remote cataract extraction he has had no other surgeries. He denies any prior hospitalizations. He is employed with a mental analysis consulting company. His only allergies are to possibly PENICILLIN. There is no family history of renal disease.

PHYSICAL EXAMINATION: He is found to be alert and oriented in no acute distress lying flat in bed with his hands surgically wrapped. He has no

St. Luke's Medical Center
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visible neck veins, goiter or adenopathy. The lung fields are clear. The pinnae are erythematous, edematous. His nose tip is cyanotic and necrotic. The forearms are edematous but soft and mildly tender. His toes are swollen and erythematous with some bullae noted and the forefeet are also swollen. The distal pulses are full. The calves and thighs are unremarkable. He has no other rashes.

A Foley catheter is in place draining dark amber urine and the sediment on my review is loaded with muddy brown casts and renal tubular epithelial cells. The cardiovascular examination demonstrates a regular rate and rhythm without gallop or rub.

IMPRESSION:
1. Ethanol abuse.
2. Loss of consciousness secondary to the above.
3. Severe frostbite injury.
4. Rhabdomyolysis. This appears to be largely emanating from the forearms.
5. Nonoliguric acute tubular necrosis secondary to myoglobinuria from the rhabdomyolysis. He maybe somewhat volume contracted yet because of the third spacing of fluid in the areas of tissue injury.
6. He will require monitoring for metabolic derangements including hyperkalemia, hypocalcemia, and hyponatremia.

The plan will be to provide further intravenous hydration with sodium bicarbonate containing fluid along with Mannitol infusion and p.r.n. loop diuretic to maintain urine flow. I will be happy to follow closely with you.

Thank you for the opportunity to share in the care of this patient.

Matthew H. Hanna, M.D.

MHH/jls
d. 02/02/96
t. 02/03/96

cc: Matthew H. Hanna, M.D.
Robert W. Goldmann, M.D.

11503B Robert W. Goldmann, M.D.
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CONSULTATION
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